

LOUISIANA STATE LAW INSTITUTE

THE MEETING OF THE COUNCIL

February 17-18, 2017

Friday, February 17, 2017

Persons Present:

Adams, E. Pete
Alford, Cory
Amond, Kristen D.
Bergstedt, Thomas
Braun, Jessica
Breard, L. Kent
Brister, Dorrell J.
Burris, William J.
Ciardullo, Maxwell
Crawford, William E.
Crigler, James C., Jr.
Curry, Kevin C.
Curry, Robert L., III
Davidson, James J., III
Dawkins, Robert C.
Dimos, Jimmy N.
Doguet, Andre
Forrester, William R., Jr.
Gambino, Anthony John J.
Gasaway, Grace B.
Gregorie, Isaac M. "Mack"
Griffin, Piper D.
Hamilton, Leo C.
Hayes, Ashle
Hayes, Thomas M., III
Haymon, Cordell H.
Hester, Mary C.
Hogan, Lila T.
Holdridge, Guy

Jewell, John Wayne
Johnson, Pamela Taylor
Knighten, Arlene D.
Kostelka, Robert "Bob" W.
Lavergne, Luke
Lawrence, Quintillis Kenyatta
Levy, H. Mark
Lonegrass, Melissa T.
McIntyre, Edwin R., Jr.
Moreau, Richard
Norman, Rick J.
Odinot, Christopher
O'Quinn, Elizabeth
Pohorelsky, Peter
Rather, James
Reed, Mahogane D.
Riviere, Christopher H.
Robertson, Alex T.
Ryan, Graham H.
Tally, Susan G.
Tate, George J.
Thibeaux, Robert P.
Trahan, J. Randall
Tucker, Zelda W.
Waller, Mallory Chatelain
Weems, Charles S., III
Wilson, Evelyn
Woodruff-White, Lisa
Ziober, John David

President John David Ziober opened the Friday session of the February 2017 Council meeting at 10:00 AM on February 17, 2017 at the Lod Cook Andonie Museum in Baton Rouge, LA by introducing Professor Melissa T. Lonegrass, Reporter of the Landlord Tenant Committee, to present materials in response to Senate Concurrent Resolution No. 131 of the 2014 Regular Session of the Legislature regarding Security Deposits and Eviction.

Security Deposits:

The Reporter reminded the Council of the directive in Senate Concurrent Resolution No. 131 of the 2014 Regular Session of the Legislature to study the laws applicable to the rights of landlords and residential tenants and make recommendations for legislation. Professor Lonegrass also reminded the Council that they approved most of the security deposit material at the September 2016 meeting leaving only a few issues for review today.

The Reporter turned the Council's attention to proposed R.S. 9:3251(C) on page 4. She explained that in present law there is no time limit for a lessee to reclaim his security deposit which may lead to complicated legal questions regarding obligations, real rights, and abandonment. At the September meeting, the Council requested an explicit cut off, therefore the Committee is proposing a three year prescriptive period. After a few questions, the proposal was approved.

The discussion of new R.S. 9:3251.1 was again lengthy. The Reporter explained that this Section follows the national trend and clearly classifies the security deposit as a security interest, but exempts lessors from the requirements of keeping a separate account and paying interest. Due to the complexity of this area of the law, members brought up some of the same concerns raised in September regarding property, ownership, financing, pledge, conversion, garnishment, revendication, and third party rights. However, the Reporter emphasized the advantages of bringing in the UCC and the nationwide trend to address this issue and the relationship between the parties. It is desirable to prevent lessees from having to fight other creditors for their security deposits. The Reporter also emphasized that she worked closely with Professor Odinet and Mr. David Cromwell in crafting this provision to balance and protect lessees, lessors, and lenders. The Reporter offered an amendment to Paragraph A to clarify the obligations of the lessor. A motion was made to require lessors to place security deposits in a separate account that cannot be swept by the bank to pay debts of the lessor, but it ultimately failed. The question was called and this proposal was adopted:

§3251.1. Security deposit; security interest

A. The lessor's interest in the security deposit is a security interest under the Uniform Commercial Code. Nevertheless, R.S. 10:9-207(c)(2) shall not apply to the security deposit. Unless otherwise required by law or by agreement of the parties, the lessor is not required to hold the security deposit in a separate account or remit to the lessee any interest earned on the deposit.

B. The claim of a lessee to a security deposit held in a deposit account maintained by the lessor with a financial institution is preferred to that of the lessor's creditors, except that the lessee's claim is subject to the rights of the following persons:

(1) The financial institution with which the deposit account is maintained.

(2) A transferee of funds from the deposit account, unless the transferee acts in collusion with the lessor in violating the rights of the lessee to the security deposit.

(3) A secured party holding a security interest perfected by control of the deposit account in accordance with R.S. 10:9-104.

Moving to proposed R.S. 9:3253(A), the Reporter reminded the Council that this was also recommitted in September of 2016. Present law authorizes damages and attorney fees, but the proposal increases the amount recoverable from \$200 to \$300 to incentivize the return of the deposit. Willful failure is removed because the lessee no longer has to demand return of the deposit. Finally, the proposal grants the court discretion to refuse damages for technical noncompliance. The Reporter explained the *Flynn* case noted in the comments and reminded the Council that they had previously asked the Committee to consider this notion. The Council was in favor of removing actual damages because of C.C. Art. 2000, but did struggle with what "technical" may mean and the notion of judicial discretion exercised by justices of the peace.

After lunch, the Council approved R.S. 9:3253(A) as follows and the Security Deposit material was complete.

~~§3253. Costs and attorney's fees~~ Return of security deposit; damages; venue; attorney fees

~~In an action brought under R.S. 9:3252, the court may in its discretion award costs and attorney's fees to the prevailing party.~~

A. If the lessor fails to comply with R.S. 9:3252, the court shall order the return of any portion of the security deposit wrongfully retained and damages in the amount of three hundred dollars or twice the amount of the portion of the security deposit wrongfully retained, whichever is greater. If the court determines that the lessee knew or should have known that the security deposit is not due or if the lessor's failure to perform was technical in nature, the court may exercise its discretion to refuse an award of damages.

Eviction:

Professor Lonegrass explained that also in response to Senate Concurrent Resolution No. 131 of the 2014 Regular Session the Committee brings before the Council proposals relative to eviction.

The first article presented was C.C. Art. 2728 on the termination of indeterminate term leases. The Uniform Act and the national trend both provide a longer notice period to terminate a lease. This proposal only extends the time period for residential month to month leases so a motion was made to apply this extension to all month to month leases. After some debate, the substitute motion failed and C.C. Art. 2728 was approved as written.

The next article was C.C. Art. 2725. The Reporter explained that automatic renewal clauses in residential leases arose as an issue during legislative hearing. In present practice, when a lease contains an automatic renewal clause the notice period to prevent renewal may be as long as a year which isn't intuitive for most lessees. A member made a motion to increase the notice period from 30 days to 60 days citing concerns for remarketing the property, but the motion failed. It was noted that lessors can protect themselves because they control the lease. This proposal was approved as written.

The Reporter next introduced C.C. Art. 2704. Another concern which came to light during the legislative hearing was the fact that Louisiana does not have a right to cure period. In the Committee's research, they found that many other states do require a grace period. The Committee's proposed addition to C.C. Art. 2704 limits the cure period to the nonpayment of rent. The Council was concerned about the procedure when a lease already contains a delay period or allows rent to be paid late with a penalty or late fee attached. The Reporter agreed to add a comment with an example to clarify this point. The Reporter also clarified that this is not waivable and failure to comply with C.C. Art. 2704 may be used as an affirmative defense in an eviction proceeding. A motion was made and passed to call the question and the proposal was adopted with a few modifications as follows:

Art. 2704. Nonpayment of rent

* * *

Nevertheless, a residential lease shall not be dissolved for the lessee's failure to pay the rent when due unless the lessor has given to the lessee a written notice to pay the rent within no fewer than ten days, with a warning that, if the lessee does not pay, the lessor may dissolve the lease. If the lessee does not pay the rent within the time given, the lessor may immediately dissolve the lease by giving written notice of dissolution to the lessee. If within six months after a notice to pay the rent has been given, the lessee fails to pay the rent when due on an additional occasion, the

lessor may immediately dissolve the lease by giving written notice of dissolution to the lessee.

The Reporter introduced changes to C.C.P. Art. 4701. The changes are needed to balance the new right to cure period and marry practice with the law. The Committee proposes separating the requirements for notice when a lease terminates for expiration of the term and when it may be terminated for the failure to perform. New Paragraph B codifies the fact that courts are terminating leases in the eviction proceeding and provides that notice of dissolution and notice to pay rent shall be considered notice to vacate. The Council also discussed and adopted changes to Paragraph C to clarify that five days must pass after notice and before a rule to evict may be filed but a period of five days to vacate the premises is not required to be given. There was a motion to call the question which passed and proposed C.C.P. Art. 4701(A), (B) and (C) were approved as follows:

Art. 4701. ~~Termination of lease; notice~~ Notice to lessee to vacate; waiver of notice

A. When a lessee's right of occupancy has ceased because of the termination of the lease by expiration of its term, ~~action by the lessor, nonpayment of rent, or for any other reason,~~ and the lessor wishes to obtain possession of the premises, the lessor ~~or his agent~~ shall cause written notice to vacate the premises to be delivered to the lessee. If the lease has no definite term, the notice required by law for its termination shall be considered notice to vacate under this Article.

B. When the lease has been dissolved or the lessor has the right to dissolution, the lessor who wishes to obtain possession of the premises shall cause written notice to vacate the premises to be delivered to the lessee. A written notice of dissolution given to the lessee shall be considered notice to vacate the premises under this Article. A written notice to pay the rent given to a residential lessee in accordance with Civil Code Article 2704 shall also be considered notice to vacate the premises provided the lessee does not pay the rent within the time given.

C. ~~The notice shall allow the lessee not less than five days from the date of its delivery to vacate the leased premises. If the lease has no definite term, the notice required by law for its termination shall be considered as a notice to vacate under this Article. If the lease has a definite term, notice to vacate may be given not more than thirty days before the expiration of the term. In all cases, a notice to vacate shall state the reasons for termination of the lease.~~

Moving to C.C.P. Art. 4701(D), the Committee specifically proposes stating that the notice requirements cannot be waived to protect lessees and balance the bargaining power between the parties. However, the exception which allowed the court to waive the requirements proved to be procedurally unworkable. Therefore, new language was crafted and the following was adopted:

D. In a residential lease, the notice requirements of this Article may not be waived by the lessee. Nevertheless, the notice requirements of this Article do not apply if a residential lessee's failure to perform seriously affects the health or safety of the lessor or any person occupying the premises or occupying adjacent property. In a lease other than a residential lease, the A lessee may waive the notice requirements of this Article by written waiver contained in the lease, in which case, upon termination of the lessee's right of occupancy for any reason, the lessor ~~or his agent~~ may immediately institute eviction proceedings in accordance with Chapter 2 of Title XI of the Louisiana Code of Civil Procedure.

In C.C.P. Art. 4732 the Committee proposes an exception to the immediate effect of a judgment of eviction when the court finds it will cause undue hardship on the lessee. The Reporter explained that some judges felt their hands were tied even in the most harrowing of circumstances and requested a review of this provision. The Committee agreed judicial discretion was needed, but the delay is not intended to be indefinitely. The Council proposed a change to limit the delay to seven calendar days and the following was approved:

Art. 4732. Trial of rule; judgment of eviction

B. If the court finds the lessor or owner entitled to the relief sought, or if the lessee or occupant fails to answer or to appear at the trial, the court shall render immediately a judgment of eviction ordering the lessee or occupant to deliver possession of the premises to the lessor or owner. Nevertheless, in exceptional circumstances, the rendition of the judgment of eviction of a residential lessee may be suspended for a reasonable time not to exceed seven calendar days to prevent undue hardship on the lessee.

To finish these materials, the Reporter asked the Council to approve all the technical changes to C.C.P. Arts. 4702, 4703, 4704, 4731, and 4912. The motion was made, seconded, and approved.

The Council adjourned for the day.

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Amy, Jeanne L.	Johnson, Pamela Taylor
Bergstedt, Thomas	Knighten, Arlene D.
Braun, Jessica	Kostelka, Robert "Bob" W.
Breard, L. Kent	Levy, H. Mark
Burris, William J.	McIntyre, Edwin R., Jr.
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Crigler, James C.	Philips, Harry "Skip", Jr.
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Dawkins, Robert G.	Waller, Mallory Chatelain
Dimos, Jimmy N.	Wilson, Evelyn
Forrester, William R., Jr.	Ziober, John David
Gambino, Anthony John, Jr.	
Garofalo, Raymond E., Jr.	
Hamilton, Leo C.	

President John David Ziober opened the Saturday session of the February 2017 Council meeting at 9:00 AM on February 18, 2017 at the Lod Cook Andonie Museum in Baton Rouge, LA. During this session, the Reporter, Professor Lucy McGough, represented the Human Trafficking Committee and presented materials in response to Senate Concurrent Resolution No. 9 from the 2016 Second Extraordinary Session.

Human Trafficking

Professor McGough began by describing the resolution which requested the Law Institute to study and make recommendations regarding the feasibility of revisions or additions to current laws regarding human trafficking. The legislature explicitly pointed the Institute toward a comprehensive review of all states' laws with two goals in mind: (1) combating and eliminating trafficking and (2) rehabilitating its victims. She next informed the Council of the Committee's extensive review of best practices, federal law, and the laws of other states. Today the Committee is only recommending the creation of a statewide commission and changes to the law related to children. In the future, the Committee will also propose changes to better address best practices for adult victims of trafficking.

Turning to the materials, the Professor commenced with the proposal to create the Louisiana Human Trafficking Prevention Commission and advisory board. The goal is to pull together all relevant state agencies within the office of the governor to avoid any duplication of services and ensure best practices. The advisory board is charged with doing the research and leg work necessary to recommend policies and procedures to be implemented by the Commission. The Council suggested adding the district attorneys and public defenders to the Commission and the proposals were approved.

Professor McGough next offered the materials regarding the exploitation of children. These changes are contained in the Children's Code. The revisions to Ch.C. Article 725 clarify that children are presumed victims of human

trafficking. Concern was raised over indemnifying children who are members of gangs and commit violent crimes such as murder or drive by shootings. It was also noted that children selling drugs could be considered labor trafficking victims. After discussion, the Council modified the language to allow for the prosecution of the crimes listed in Ch.C. Art. 305(A) even if they are related to the exploitation of a child and the proposal was adopted as follows:

Art. 725. Findings and purpose

The legislature finds that arresting, prosecuting, and incarcerating ~~victimized~~ children victimized by commercial sexual activity or labor trafficking serves to re-traumatize them ~~and to increase their feelings of low self-esteem,~~ which only makes the process of recovery more difficult. Both federal and international law recognize that ~~sexually~~ exploited children are the victims of crime and should be treated as such. Therefore, ~~sexually~~ exploited children ~~should~~ shall not be prosecuted for criminal acts related to ~~prostitution~~ their exploitation except those crimes provided in Article 305(A). Instead, ~~sexually~~ exploited children ~~should,~~ where possible, shall be diverted into services that address the their needs ~~of these children outside of the justice system.~~ ~~Sexually~~ exploited Exploited children deserve the protection of child welfare services, including diversion, crisis intervention, counseling, and emergency housing services.

The purpose of this Chapter is to protect a child from further victimization after the child is discovered to be a ~~sexually~~ an exploited child by ensuring that a child protective response is in place in the state. This is to be accomplished by conclusively presuming that any child engaged in prostitution, prostitution by massage, or any crime against nature ~~by solicitation is a victim of sex trafficking and providing these children with the~~ is exploited and that any child victim of labor trafficking is exploited. These children shall be provided appropriate care and services ~~where possible.~~ In determining the need for and capacity of services that may be provided, the Department of Children and Family Services shall recognize that ~~sexually~~ exploited children have separate and distinct service needs according to gender, and every effort should be made to ensure these children are not ~~prosecuted or treated as juvenile delinquents~~ adjudicated delinquent, but instead are given the appropriate social services.

With little discussion, the Council approved Ch.C. Arts. 725.1 and 725.2 which include the definitional section and the conclusive presumption that a child taken into custody for certain crimes is a victim of trafficking for sexual purposes and lacks the capacity to consent to commercial sexual activity.

The Reporter next described Ch.C. Art. 725.3 which classifies exploited children as Child In Need of Care. The Reporter rationalized making all the rules applicable in that Title applicable to exploited children. The proposal was adopted without change.

Directing the Council to proposed Ch.C. Article 725.4, the Reporter explained the importance of notification to the court and the Department of Children and Family Services to ensure that victims are provided all available services. The Council adopted this measure.

Ch.C. Art. 725.5 borrows provisions from Ch.C. Art. 1432 to authorize the use of protective custody in a narrow circumstance. The Reporter noted the significance of balancing a child's loss of liberty with his need for mental health or substance abuse treatment. With a motion and second, this Article was approved.

Moving to Ch.C. Art. 725.6, the Reporter reminded the Council that this proposal changes the lead agency from the Department of Corrections to the Department of Children and Family Services to ensure that victims are given services and not treated as criminals. The source of this Article is former Ch.C. Article 725.3 and it spells out the responsibilities of the department. With no discussion, the Council adopted the article.


Professor McGough next tendered Ch.C. Art. 725.7 and apprised the Council that it was taken from the Uniform Act on Prevention of and Remedies for Human Trafficking. It will supplement present Ch.C. Art. 412 which also addresses confidentiality. This was adopted without discussion so the Reporter moved to Ch.C. Art. 725.8. This proposal changes the expungement process in existing law because exploited children may not be prosecuted for offenses related to their trafficking. With a motion and a second, this article was adopted without change.

The changes to Ch.C. Arts. 116 and 606 are technical in nature and needed because of the substantive changes already approved. The Council adopted them together. However, the Council heavily questioned the changes to Ch.C. Arts. 610 and 612 because of the impact it will have on the parents of a child if the parent is not at fault for the child's exploitation. The Council recommitted these articles to the Committee with the mandate that they create judicial discretion regarding the listing of names in the child abuse registry.

To finish the materials, the Council adopted the technical changes to Ch.C. Articles 622, 728, 804, and the repeal of Ch.C. Arts. 839(D) and 923.

CONCLUSION

Having completed the presentation of the material from the Committee on Human Trafficking, the Council adjourned the meeting.



Jessica Braun

4-11-17

Date