

LOUISIANA STATE LAW INSTITUTE

MEETING OF THE COUNCIL

November 9-10, 2018

Friday, November 9, 2018

Persons Present:

Adams, E. Pete	Leighton, Maggie
Adams, Marguerite (Peggy) L.	Little, F.A., Jr.
Bergstedt, Thomas M.	Lonegrass, Melissa T.
Cardella, Mackenzie Schott	Lovett, John
Carroll, Andrea B.	Manning, C. Wendell
Castle, Marilyn	Medlin, Kay C.
Cheatham, Steven E.	Mengis, Joseph W.
Crigler, James C., Jr.	Miller, Cody "C.J."
Cromwell, L. David	Miller, Gregory A.
Davrados, Nick	Morris, Glenn G.
Dawkins, Robert G.	Norman, Rick J.
Dimos, Jimmy N.	North, Donald W.
Doguet, Andre'	Price, Donald W.
Domingue, Billy J.	Richardson, Sally Brown
Ferg, Jon	Riviere, Christopher H.
Forrester, William R., Jr.	Saloom, Douglas J.
Garofalo, Raymond E., Jr.	Scalise, Ronald J., Jr.
Garrett, J. David	Sole, Emmett C., Jr.
Gasaway, Grace B.	Stuckey, James A.
Griffin, Piper D.	Surprenant, Monica T.
Hamilton, Leo C.	Talley, Susan G.
Haymon, Cordell H.	Tate, George J.
Hebert, Christopher B.	Thibeaux, Robert P.
Holdridge, Guy	Title, Peter S.
Jewell, John Wayne	Trtan, Kim
Johnson, Pamela Taylor	Tucker, Zeldia W.
Kostelka, Robert "Bob" W.	Vance, Shawn D.
Kunkel, Nick	Varnado, Sandi, S.
Kutcher, Robert A.	Waller, Mallory
Lampert, Loren	Weems, Charles S., III
Lawrence, Quintillis Kenyatta	Woodruff-White, Lisa

President Susan G. Talley called the November 2018 Council meeting to order at 10:00 a.m. on Friday, November 9, 2018, at the Louisiana Supreme Court in New Orleans. She began by introducing Kim Trtan, Margaret Leighton, and Jon Ferg of Thomson Reuters in Minnesota and thanking them for attending today's meeting. After asking the members of the Council to briefly introduce themselves, the President called on Professor Melissa T. Lonegrass, Reporter of the Notaries Committee, to begin her presentation of materials.

Notaries Committee

Professor Lonegrass began her presentation with a recap of the topic being covered and the Committee's work to that point. She explained that, although some forms of electronic notarization—namely, in person notarization of electronic signatures—are already authorized under LUETA, a practical impediment to the use of such process existed in the fact that most parishes do not accept electronic recordation. Thus, Professor Lonegrass explained, the use of electronic notarization in this context makes no practical sense and is widely disregarded as an option. The Reporter continued, explaining that, although not all parishes currently accept electronic recordings, some—for example Jefferson Parish—can, and the clerks of court are mandated to accept such recordings by 2022. Thus, she summarized, electronic recordation capability was already

"in the works." Professor Lonegrass explained that what the Committee was proposing today did not actually deal with electronic recordation, but rather with the paper recordation of printout copies of electronic records. In this sense, she reasoned, the Committee's proposal was simply a stopgap measure until 2022.

Professor Lonegrass next noted that, although some law seems to already permit the recordation of print copies of electronic records, most clerks nevertheless do not accept such recordings, owing to Civil Code Article 3344. This Article, she explained, was what the Committee proposed to amend. The Reporter then read the current Article, highlighting the language "original" as the impediment. She further pointed out that this issue had arisen in other states as well, and that RULONA has a provision dealing with the issue. The Committee's goal, Professor Lonegrass stated, was to fill the aforementioned gap in the law, enhance clarity in the area, and achieve uniformity with other states. The Reporter then moved to the actual draft proposals. She pointed out the slight change to Article 3344 to carve out an exception and noted that the second provision would be doing most of the heavy lifting. She noted for the Council that the numbering of the proposed new Section was a typo, and that the provision should be found at R.S. 9:5561. Professor Lonegrass added that this provision would be creating a new Title within the Civil Code ancillaries, as there was nothing currently categorized as dealing specifically with registry.

At this point, a motion and second were made to adopt the provision. One Council member inquired as to what would happen in the case of a multi-party, multi-notary document. The Reporter answered that she was unsure as a specific matter, adding that the provision tapped into the general rule. Accordingly, she surmised, the provision ought to operate the same way it would with respect to a traditional paper document of the same nature. Another Council member wondered if using the language "a" notary as opposed to "the" notary would do violence to the intent of the revision. The Council member suggested this modification so as to incorporate the multi-notary situation raised previously. The Reporter pointed out that the relevant language in R.S. 35:2 states "the notary before whom ..." arguing that on this basis, the language ought not be relaxed in the provision at issue. The Council member who made the suggestion clarified that it was not, in fact, his intent to "relax" the language or allow for it not to be the notary who passed the act. Another Council member pointed out that R.S. 35:2.1 uses the language "the notary or one of the notaries before whom ..."—more in line with the prior suggestion.

A member of both the Committee and the Council then referred to Civil Code Article 1840, suggesting that the language there ought to be tracked and urging against non-uniform use of "a notary" versus "the notary." The member further recommended adding the language "or other officer ..." The Reporter agreed with these suggestions and further voiced her reluctance to use the language "a notary." Next, another member of both the Committee and the Council wondered whether the correct language was "the original signature ... before whom that party executed ..." After another Council member raised the possibility of simply using cross references, the suggestion was made that the provision might fit best as Paragraph B of the Civil Code Article. The Reporter noted that this issue had been discussed by the Committee. She explained that, because the language refers to terms from LUETA—which is part of Title 9—and uses the non-Civil Code term "tangible," it fits best where it is. She conceded that there were arguments on each side, noting simply that the Committee's decision to place the provision where it was currently found was a conscious one. In a similar vein, a member of both the Committee and the Council urged his distaste for using terms such as "electronic record" and "tangible copy" in the Civil Code. The Reporter added that another reason for the current location of the provision was that there are currently clerks treating Article 3344 as not permitting electronic recordation. She added that there are reasons to believe this interpretation is incorrect and it therefore might make sense to put the exception closer to the rule.

Another Council member then turned the discussion back to the issue of the language “a notary” versus “the notary.” The Council member urged that the Council make a final decision on the policy matter of referencing one notary or all of the notaries. One Council member reminded the Council that this provision was directing the clerk of court, arguing that if the Council elected to say “a notary,” it would potentially be authorizing any notary at all. Another Council member pointed out that the notarial act of correction statute used the language “any one of the notaries.” One Council member then urged the Council to keep in mind that the provision would not actually be certifying the validity of the signatures but rather simply certifying that the document at issue was a true copy—thus, he argued, the task was one that ought to be able to be accomplished by a single notary. A member of both the Committee and the Council disagreed, arguing that if it was not the notary before whom the act was passed, that notary would not have the knowledge necessary to certify the copy as a true copy. The Council member clarified that he was referring to any one notary who *passed the act*—not to a “stranger” notary. Another Council member then laid out the Council’s three options: first, to require the signature of all notaries involved; second, to require the signature of any one of the notaries involved; and third, to require the signature of any one notary at all. After this, a motion was made and seconded to change the word “the” at the second line of R.S. 9:5561 to “a.” The motion ultimately carried.

Referring to a question that had been raised just prior to the vote on the prior motion, the Reporter directed the Council to now discuss the issue of whether the word “party” was inclusive of notaries as well. She explained that this could become an issue owing to the fact that the notary’s signature might not be “original” either. A motion was made and seconded to discuss the issue further, and the motion passed. A member of both the Committee and the Council advocated that the discussion was not, in fact, necessary, due to the fact that the hang-up with Article 3344 exists only with respect to the signature of the party. Another member of both the Committee and the Council agreed, adding that there is no requirement for the print copy to be notarized in any event. At this, another Council member suggested simply eliminating the language “of a party” altogether. The Reporter voiced her agreement with the arguments laid out by the Committee and Council members, but also reminded the Council that the problem it faced was a practical one, reasoning that if the Council felt that eliminating the aforementioned language helped, then she would be agreeable to such a change. Another Council member voiced support for the previously articulated view in opposition to the suggested deletion. At this, a motion was made and seconded to elaborate on the language “of a party.” With just four votes in favor, the motion ultimately failed.

Professor Lonegrass then read the full provision as amended, asking if there was any additional discussion. One Council member voiced distaste for the newly added language “or other officer authorized to ...” A member of both the Committee and the Council reminded the Council member that this language was included so as to track Article 1840; the Council member acquiesced. Then, a motion and second was made to adopt the content of the provision in its entirety. With all votes in favor, the motion carried and the content was adopted. The Reporter next moved to the specific placement of the provision. A member of both the Committee and the Council made a further pitch in favor of keeping the provision out of the Civil Code—noting that, in addition to the points that had been raised earlier, the provision was simply intended to serve as a stopgap until 2022 and thus its inclusion in the Civil Code would be inappropriate. After some additional brief discussion as to whether, in fact, there were Chapters on Registry in Title 9, a motion was made and seconded to retain new R.S. 9:5561 and Title XXII-A where they were. The motion passed with all votes in favor.

Professor Lonegrass then concluded her presentation, and the President called on Professor Glenn Morris, Reporter of the Corporations Committee.

Corporations Committee

Professor Morris began his first presentation of the Corporations Committee's proposed revisions to LLC law by explaining that the Committee's goal was to harmonize existing provisions of Louisiana LLC law with the recently enacted Louisiana Business Corporation Act (LBCA) to the extent possible and to model its revisions on the Uniform Limited Liability Company Act (ULLCA), the ABA Prototype Act, and provisions of Delaware law. He then provided the Council with background information concerning existing provisions of Louisiana LLC law, including that it was drafted based on Louisiana partnership law and the ABA Act that existed at the time, and explained that in his view, the most significant issues for the Committee to address are balancing the interests of sophisticated parties by permitting flexibility, innovation, and freedom of contract with the interests of unsophisticated parties by providing default rules. He also discussed the potential elimination of the duties of care and loyalty but retention of the contractual obligation of good faith and fair dealing, as well as issues pertaining to transferability and heritability, both in general and with respect to single member LLCs specifically. The Reporter then noted that the Council would be considering the Committee's proposed revisions to Chapters 1 and 2 of ULLCA, noting the exception that the provisions on formation were mostly taken from the LBCA rather than adapted from ULLCA.

After explaining that consideration of §101, on page 2 of the materials, would be deferred pending completion of the project because the Committee thinks it likely that this Act, like the LBCA, will not really be "uniform," Professor Morris directed the Council's attention to §102, beginning on page 3 of the materials, to consider the first few definitions that had been approved by the Committee. He requested that the Council consider the definition of "expenses," Paragraph (4A) on page 3, and the definition of "proceeding," Paragraph (16A) on page 4, together because these provisions relate to the same issue and were both taken from the LBCA. It was moved and seconded to adopt these proposed definitions as presented, and the motion passed with no objection. The adopted proposals read as follows:

§102. Definitions

In this Chapter, unless the context requires otherwise:

* * *

(4A) "Expenses" means reasonable expenses of any kind, including attorney's fees and other litigation-related expenses, that are incurred in connection with a matter.

* * *

(16A) "Proceeding" means any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, arbitral, or investigative and whether formal or informal.

The Council then considered the definition of "operating agreement," §102(13), on page 5 of the materials. After pointing to the existing definition under R.S. 12:1301(A)(16) on page 7 of the materials, the Reporter explained that the proposed definition on page 5 would permit any agreement of all of an LLC's members, whether written, oral, or tacit, to serve as an operating agreement. He also explained that Committee members expressed concerns with respect to oral and tacit operating agreements and with respect to the possibility that the members may contemplate one document acting as the single, fully integrated operating agreement, which led to the Committee's decision to include the proposed definition of "exclusive operating agreement" as Paragraph (13A) on page 10 of the materials. Professor Morris also explained the fiction that presently exists with respect to single-member LLCs – and the notion that the sole member can have an "operating agreement" – by noting that the Comments to ULLCA explain that the operating agreement for a single-member LLC is an agreement between the individual acting as the sole member and the LLC itself.

A motion was then made and seconded to adopt the proposed definition of "operating agreement" in §102(13) on page 5 of the materials. One Council member questioned whether the fiction concerning single-member LLCs could be resolved by defining an operating agreement as the agreement of all of the members of an LLC or a statement of the sole member concerning the matters described in §105, but Professor Morris responded that a statement should not be required for single-member LLCs when operating agreements for all other LLCs may be written, oral, or tacit. Another member expressed concern with respect to single-member LLCs in the context of a sole member who, for example, says that he included a provision in the operating agreement that gives him the ability to buy back all of the membership interests of the LLC, and later new members are admitted to the LLC who cannot possibly know about this provision because it was not disclosed. Professor Morris then explained that the Committee shared this concern and that a later provision addresses this issue by limiting the extent to which new members of an LLC are bound by existing operating or other agreements, and another Council member suggested that perhaps a Comment explaining the fiction of single-member LLCs would be helpful.

The Council then discussed issues pertaining to tacit operating agreements, and the Reporter noted that existing LLC law permits only written or oral operating agreements but that in his view, tacit agreements are more reliable than oral agreements. He then provided the example of cases where the initial operating agreement says that profits will be shared in a certain manner, such as 50-50, but tax documents later filed by the LLC reflect a different manner of profit-sharing, such as 75-25, representing a tacit agreement among the members with respect to this issue. A Council member then questioned whether an exclusive operating agreement would need to be designated as such under lines 4 and 5 of page 5 of the materials, when, under §105, an exclusive operating agreement can simply be called an operating agreement and provide that it states the entire agreement of the parties. Another Council member agreed that this language as drafted creates the potential for confusion and questioned whether an exclusive operating agreement that does not meet the requirements of §105 would be an operating agreement or would be nothing at all. As a result, and after additional discussion, it was suggested that the exception for exclusive operating agreements should be deleted from the second sentence of the definition, or that this sentence should be redrafted to read as follows: "The agreement need not be called an operating agreement and, except as required for an exclusive operating agreement, may be party or entirely written, oral, or tacit."

A motion was made and seconded to delete the "except as" clause on line 4 of page 4, and members of the Council engaged in debate with respect to this issue, with some expressing opposition to the deletion of this clause, others suggesting adding an additional sentence providing that an exclusive operating agreement must comply with the requirements of §105, and still others noting that this is simply the definition of "operating agreement" and perhaps no additional language pertaining to exclusive operating agreements should be included here. The Council also discussed whether in the context of an exclusive operating agreement, a subsequent oral agreement pertaining to a topic that was not addressed in the exclusive operating agreement would constitute an operating agreement, and Professor Morris responded in the negative, explaining that this would simply be a separate contractual agreement that would be binding on the parties. This prompted a great deal of discussion with respect to the parol evidence rule, and one Council member noted that under existing jurisprudence, the parties to a written agreement can verbally agree to verbally modify the existing written agreement, and the circumstances in which this rule does not apply are very limited. Other Council members then questioned the value of the concept of an exclusive operating agreement in light of the complexity of these issues, with some expressing that perhaps such an agreement needs to state that it is an exclusive operating agreement in order to be effective. Other Council members agreed with this sentiment, expressing concern with respect to the frequency with which operating agreements are initially drafted but never formally amended and noting that this issue would only be exacerbated by the concept of an exclusive operating agreement, particularly one that does not have to be designated as such. A vote was then taken on the motion to delete "Except as required for an exclusive operating agreement," on line 4 of page 5, and the motion passed with 22 in favor and 14 opposed.

The Council then adjourned for lunch, during which time there were meetings of the Membership and Nominating and Executive Committees. After lunch, the President asked Professor Morris to continue his presentation of materials on behalf of the Corporations Committee.

The Reporter reminded the Council that, prior to lunch, a motion was made and ultimately passed to delete "Except as required for an exclusive operating agreement," from line 4 of page 5 of the materials. It was then moved and seconded to redraft the second sentence of §102(13) to read as follows: "The agreement need not be called an operating agreement and, except as required for an exclusive operating agreement, may be partly or entirely written, oral, or tacit." The motion passed with no objection, and a motion was then made and seconded to adopt Paragraph (13) as amended and Paragraph (13A), on page 10 of the materials, as presented. This motion also passed with no objection, and the adopted proposals read as follows:

§102. Definitions

In this Chapter, unless the context requires otherwise:

* * *

(13) "Operating agreement" means the agreement ~~whether or not referred to as an operating agreement and whether oral, implied, in a record, or in any combination thereof, of the sole member or all the members of a limited liability company, including a sole member,~~ concerning the matters described in Section 105(a). The agreement need not be called an operating agreement and, except as required for an exclusive operating agreement, may be partly or entirely written, oral, or tacit. [The term includes the agreement as amended or restated.] An operating agreement includes any amendment that is adopted in accordance with the agreement, even if the agreement permits the amendment to be approved by fewer than all members of the company.

(13A) "Exclusive operating agreement" means an operating agreement that meets the requirements of R.S. 12:22-105(F).

* * *

After agreeing to defer consideration of §§103 and 104, on page 11 of the materials, the Council turned to §105, on page 12 of the materials, and Professor Morris noted that Subsections C through E were not included in the materials because the Committee was still drafting them. It was first moved and seconded to adopt Subsection A on page 12, and when one Council member suggested deleting "all of" on line 3 of page 12, the Council agreed. A vote was then taken on the motion to adopt Subsection A as amended, and the motion passed with no objection. Next, a motion was made and seconded to adopt Subsection B on page 12, and members of the Council engaged in a great deal of discussion with respect to the reference to "other applicable law" on line 12 of page 12. Specifically, Council members expressed their concerns that, as drafted, Paragraph B could be interpreted as providing that when a matter is governed by the operating agreement, the operating agreement displaces not only the default rules provided by this Chapter, but also provisions of other applicable law, such as contract law generally. As a result, it was moved and seconded to delete "and other applicable law" from line 12 of page 12, and the motion passed with no objection. A vote was then taken on the motion to adopt Subsection B as amended, and this motion also passed with no objection. The Council then turned to Subsection G, on pages 12 and 13, and after one Council member suggested that "and after" be deleted on line 25 of page 12 and the first two sentences of this provision be reversed, it was moved and seconded to adopt Subsection G as amended, and the motion passed with no objection. The adopted proposals read as follows:

R.S. 12:22-105. Operating agreement; scope, function, and limitations; exclusive operating agreement

A. Except as otherwise provided in Subsections ~~(C)~~ and ~~(D)~~ C and D of this Section, the operating agreement governs the following matters:

(1) The admission of members to the limited liability company.

~~(1) relations~~ (2) Relations among the members as members and between the members and the ~~limited liability company~~;

~~(2) the~~ (3) The rights and duties under this Chapter of a person in the capacity of manager;

~~(3) the~~ (4) The activities and affairs of the company and the conduct of those activities and affairs; ~~and~~ .

~~(4) the~~ (5) The means and conditions for amending the operating agreement.

B. To the extent the operating agreement does not provide for a matter described in Subsection ~~(A)~~ A of this Section, this Chapter governs the matter.

* * *

G. An exclusive operating agreement takes effect when stated in the agreement or, if no effective time is stated in the agreement, when approved as required by Subsection F of this Section. When an exclusive operating agreement takes effect, it supersedes all provisions of any other operating agreement otherwise in effect. An exclusive operating agreement may be amended only as provided in the agreement or, if the agreement does not state how it is to be amended, by an amendment that is approved in one or more signed writings by all members of the company.

The Council then considered §105(F), on page 12 of the materials, and Professor Morris explained that whereas Paragraph (1) provides that a written operating agreement will be exclusive if it states that it is the exclusive operating agreement of the LLC, Paragraph (2) permits a written operating agreement to be exclusive even without such a statement, provided that it is identified as an operating agreement and contains an integration clause. A motion was made and seconded to adopt Subsection F, and another motion was quickly made and seconded to delete “meets either of the following requirements” on line 19 of page 12 and to delete the entirety of Paragraph (F)(2), on lines 22 through 24 of page 12. One Council member then explained that in his view, allowing an operating agreement to become exclusive solely because it has an integration clause is dangerous, particularly in light of the previous discussion concerning the parol evidence rule and the argument that an exclusive operating agreement cannot be amended via a subsequent oral agreement. Other Council members expressed their support of the suggestion to require an operating agreement to contain “magic words” designating it as the exclusive operating agreement in order to ensure that this is absolutely the intent of the members and is not being done inadvertently. Some Council members again questioned the value of incorporating the concept of exclusive operating agreements, and others advocated for including the option for exclusivity, particularly in the case of sophisticated parties. However, one Council member argued that even the most sophisticated of parties, such as doctors and lawyers, do not ever engage in the process of formally amending their existing operating agreements and cautioned against providing that in such cases, absent some sort of overt act on the part of the members beyond including an integration clause, subsequent oral or even tacit amendments to these operating agreements cannot be made. A vote was then taken on the motion to delete “meets either of the following requirements” on line 19 of page 12 as well as Paragraph (F)(2) in its entirety, and the motion passed with no objection.

The Reporter then asked for clarification from the Council with respect to the “magic words” that should be required to designate a written operating agreement as an exclusive operating agreement under §105(F) on page 12 of the materials. One Council member suggested that perhaps the document must reference the provisions of this Subsection specifically or must be entitled the exclusive operating agreement. The Council then returned to its previous discussion with respect to whether the concept of an exclusive operating agreement should even be adopted in the first place, with one Council member noting that the exceptions to the jurisprudential rule with respect to provable subsequent oral amendments to written agreements, even if the agreement requires any amendments to be made in writing, is very narrow – guarantees are one example of such an exception – and again questioning whether exclusive operating agreements should be included in this narrow category. The Council then discussed that the consequences of providing for exclusive operating agreements are that such agreements would supersede any prior agreements; would not be subject to the rule concerning the validity of subsequent oral amendments to a written agreement; and would eliminate the possibility that the operating agreement could be comprised of several different agreements. Several Council members recognized the utility of providing certainty under LLC law similar to that achieved by having only a single set of bylaws under corporations law.

Professor Morris then requested that a vote be taken on the policy question of whether to include the concept of an exclusive operating agreement, and the President clarified that those who voted in favor of including such a concept would be doing so under the assumption that proper requirements would be drafted by the Committee to limit the possibility that these exclusive operating agreements could be created inadvertently. A majority of the Council agreed that the concept of exclusive operating agreements should be included, with only a few opposed to this idea, and a motion was then made and seconded to recommit §105(F) for purposes of determining the criteria that should be required to create an exclusive operating agreement. The motion to recommit passed with no objection.

Next, the Council considered §107, on page 16 of the materials, and a motion was quickly made and seconded to adopt Subsections A and C as presented and to defer consideration of Subsection B. The Council then turned to Subsection D on page 17, and the Reporter explained that this provision is radical in that it provides that in the event of a conflict between the provisions of the articles of organization and the provisions of the operating agreement, as between the members of the LLC, the operating agreement controls. However, as between third persons, the articles of organization will control, since third persons are entitled to rely upon the public records. One Council member questioned the meaning of “dissociated” on line 4 of page 17, and Professor Morris explained that ULLCA uses this term to describe former members of an LLC. Another Council member questioned how a document is delivered by an LLC and suggested that perhaps “delivery” should be a defined term. The Council then discussed issues pertaining to actual vs. apparent authority and also discussed whether the articles of organization should be required to specify whether the LLC has an exclusive operating agreement. One Council member then questioned what the result would be in a case where a provision in the operating agreement and articles of organization conflict and the operating agreement is actually more favorable to the third person. After discussion, a motion was made and seconded to recommit §107(D) for purposes of redrafting the provision to provide that although third persons can rely upon documents filed in the public record, they should not be prejudiced by an inconsistency between the articles of organization and the operating agreement. The motion passed with no objection, and §107(A) and (C) as adopted by the Council read as follows:

§107. Operating agreement; effect on third parties and relationship to records documents filed on behalf of limited liability company

A. A written provision in the An operating agreement may specify that its an amendment of the agreement requires the approval of a person that is not a party to the agreement or the satisfaction of a condition. An amendment is ineffective if its adoption does not include the required approval or satisfy the specified condition.

* * *

C. If a ~~record~~ document delivered by a limited liability company to the secretary of state for filing becomes effective and contains a provision that would be ineffective under ~~Section 105(e) or (d)(3)~~ R.S. 12:22-105(C) or (D)(3) if contained in the operating agreement, the provision is ineffective in the ~~record~~ document.

Professor Morris then directed the Council's attention to §108, on page 20 of the materials, and motions were quickly made and seconded to adopt Subsections A, B, C, and D as presented. These motions passed with no objection, and the Council then considered Subsection E. The Reporter explained that this provision concerning L3Cs presently exists in R.S. 12:1302(C) and was designed to provide tax advantages in certain situations but is complex and poorly drafted; however, because there are no experts with respect to L3Cs on the Committee, and representatives from the secretary of state's office recalled one or two being filed, the Committee ultimately decided to simply replicate the existing language. Professor Morris then suggested that perhaps this provision could be eliminated moving forward but a grandfather clause could be drafted to protect existing L3Cs. The Council then discussed that if the language of existing law were retained, it would need to be redrafted, but members disagreed as to whether this provision should be retained, removed, or relocated. Ultimately, a motion was made and seconded to recommit Subsection E for purposes of conducting research to determine how many L3Cs exist in Louisiana, as well as whether other states' laws include a provision such as this. The motion passed with no objection, and one Council member then suggested that when the provisions in §§107 and 108 are redrafted, the Committee should consider whether a reference to §108, particularly Paragraph (E)(1), should be included in §107(D). §108(A) through (D) as adopted by the Council read as follows:

§108. Nature, purpose, and duration of limited liability company

A. A limited liability company is ~~an entity~~ a juridical person distinct from its ~~member or members~~.

B. A limited liability company may have any lawful purpose, regardless of whether for profit. Unless a more limited purpose is set forth in its articles of organization, a limited liability company has the purpose of engaging in any lawful business or activity.

C. A limited liability company has perpetual duration unless stated otherwise in its articles of organization.

D. A limited liability company may engage in a business or activity that is subject to regulation under another statute of this state to the extent not prohibited by the other statute.

* * *

Next, the Council considered §109, on page 23 of the materials. A motion was made and second to adopt this provision as presented, and the motion passed with no objection. The adopted proposal reads as follows:

§109. Powers

A limited liability company has the capacity to sue and be sued in its own name and the power to do all things necessary or convenient to carry on its activities and affairs.

The Council then skipped §§110 and 111, on page 25 of the materials, and considered §112, on page 26 of the materials, which Professor Morris explained was coded against the corresponding provision of the LBCA. A motion was made and seconded to adopt Paragraphs (A)(1), (2), and (3) as presented, including the bracketed language on line 6 of page 27 for purposes of being consistent with the LBCA, and the motion passed with no objection. The Council then discussed Paragraph (A)(4) and agreed that a reference to Subparagraph (A)(3)(e) should not be included but that the citation on line 15 should be corrected. A motion was made and seconded to adopt Paragraph (A)(4) as amended, and the motion passed with no objection. After correcting the citation on line 1 of page 28, motions were made and seconded to adopt Subsection B as amended and Subsection C as presented, and these motions also passed with no objection. The Council then considered Subsections D and E, on pages 28 and 29, and one Council member suggested that "may not be taken into account" should be deleted on line 2 of page 29 and "the secretary of state may not take into account" should be added after "person" on line 19 of page 28. Professor Morris accepted this change and also agreed to consult the Committee with respect to registered limited liability partnerships, both in this provision and in the LBCA, because the articles of such entities do not have to be filed with the secretary of state, but their names should still be protected. A motion was then made and seconded to approve Subsection D as amended and Subsection E as presented, and the motion passed with no objection. A motion was also made and seconded to adopt Subsections F, G, H, I, and J as presented, and this motion passed with no objection. §112 as adopted by the Council reads as follows:

§1-401. Corporate name § 112. Permitted names

A.(1) ~~A corporate name~~ The name of a limited liability company may include words in any language but must be written in English letters or characters.

(2) ~~A corporate name~~ The name of a limited liability company, other than a low-profit limited liability company, must contain the word "corporation", "incorporated", "company", or "limited," words limited liability company or the abbreviation, with or without punctuation, "corp.", "inc.", "co.", or "ltd." "L.L.C." or "L.C.". The name of a low-profit limited liability company must contain the words "low-profit limited liability company" or the abbreviation "L3C" or "l3c".

(3) ~~A corporate name~~ The name of a limited liability company may not contain any of the following:

(a) Any language stating or implying that the ~~corporation~~ limited liability company is organized for a purpose other than that permitted by ~~R.S. 12:1-304~~ R.S. 12:22-108 and its articles of ~~incorporation~~ organization.

(b) The phrase "doing business as" or any abbreviation of that phrase, such as "d/b/a".

(c) Any words that deceptively or falsely suggest a charitable or nonprofit nature or that imply that the ~~corporation~~ limited liability company is an administrative agency of this state or any of its political subdivisions or of the United States.

(d) Except as indicated, any of the following quoted words or phrases in any form:

(i) "Casualty", "redevelopment corporation", or "electrical cooperative".

(ii) Except for a bank holding company, "bank", "banker", "banking", "savings", "safe deposit", "trust", "trustee", "building and loan", "homestead", or "credit union".

(iii) Except for an independent insurance agency or brokerage ~~corporation~~ limited liability company, "insurance".

(e) Words or phrases that consist of or comprise immoral, deceptive, or scandalous matter.

(4) A court having jurisdiction may, upon application of the state or of any interested or affected person, enjoin a ~~corporation~~ limited liability company from doing business under a name that violates any part of ~~R.S. 12:1-401(A)(3)(e) or (d)~~ Subparagraph (3)(c) or (d) of this Subsection.

B. Except as authorized by Subsections C and D of this Section, the name of a limited liability company a ~~corporate~~ name must be distinguishable from all of the following:

(1) The corporate name of a corporation or nonprofit corporation incorporated in this state.

(2) A corporate name reserved or registered under R.S. 12:1-402 or 1-403.

(3) The name of a foreign corporation or foreign nonprofit corporation, as stated in the certificate of authority to do business in this state issued to that corporation under Chapter 3 of this Title.

(4) The name of a domestic limited liability company or the name of a foreign limited liability company used in the foreign limited liability company's certificate of authority to do business in this state.

(5) The name of a limited liability company reserved or registered under R.S. 12:22-113 or 114.

~~(5)~~ (6) The name of a partnership whose contract for partnership is filed for registry with the secretary of state or the name of a duly registered foreign partnership.

~~(6)~~ (7) A trade name registered with the secretary of state.

C. A limited liability company ~~corporation~~ may apply to the secretary of state for authorization to use a name in its filings with the secretary of state that is not distinguishable from one or more of the names described in Subsection B of this Section. The secretary of state shall authorize the use of the name applied for if either of the following occur:

(1) The other registrant consents to the use in writing and submits the document required by law to change its name to one that is distinguishable from the name of the applying ~~corporation~~ limited liability company, effective no later than the time that the applying ~~corporation~~ limited liability company will begin to use the registrant's former name.

(2) The applicant delivers to the secretary of state a certified copy of the final judgment of a court of competent jurisdiction establishing the applicant's right to use the name applied for in this state.

D. Except as otherwise provided in Subsection E of this Section, in determining whether a name is distinguishable from the name of another person, words, phrases, or abbreviations indicating a type of person, such as "corporation", "corp.", "incorporated", "inc.", "professional corporation", "P.C.", "PC", "professional association", "P.A.", "PA", "limited", "ltd.", "limited partnership", "L.P.", "LP", "limited liability partnership", "L.L.P.", "LLP", "registered limited liability partnership", "R.L.L.P.", "RLLP", "limited liability limited partnership", "L.L.L.P.", "LLLp", "registered limited liability limited partnership", "R.L.L.L.P.", "RLLLp", "limited liability company", "L.L.C.", "LLC", "limited cooperative association", "limited cooperative", or "L.C.A.", or "LCA" may not be taken into account.

E. A person may consent in writing to the use of a name that is not distinguishable from its name except for the inclusion of a word, phrase, or abbreviation indicating the type of person as provided in Subsection D of this Section. In such a case, the person need not change its name pursuant to Subsection C of this Section.

~~D. A corporation may use in its filings with the secretary of state a name that is not distinguishable from one or more of the names described in Subsection B of this Section if the registrant of the name is incorporated, organized, or authorized to transact business in this state and the proposed user corporation did any of the following:~~

~~(1) Merged with the other registrant.~~

~~(2) Came into existence through the reorganization of the other registrant.~~

~~(3) Acquired all or substantially all of the assets, including the name, of the other registrant.~~

~~E F. This Chapter does not control the use of fictitious, assumed, or trade names.~~

~~F G. If the secretary of state receives for filing articles of organization incorporation that include in the corporate name of the limited liability company the word "bank", "banker", "banking", "savings", "safe deposit", "trust", "trustee", "building and loan", "homestead", "credit union", or any other word of similar import, the secretary of state shall not file the articles of incorporation organization until the secretary of state receives satisfactory evidence that written notice of the proposed use of that name was delivered to the office of financial institutions at least fourteen days earlier.~~

~~G H. If the secretary of state receives for filing articles of incorporation organization that include in the corporate name of the limited liability company the word "engineer", "engineering", "surveyor", or "surveying," the secretary of state shall not file the articles of incorporation organization until the secretary of state receives either of the following:~~

~~(1) Satisfactory evidence that written notice of the proposed use of that name was delivered to the Louisiana Professional Engineering and Land Surveying Board at least ten days earlier.~~

~~(2) A written waiver of the ten-day notice requirement, signed by the executive secretary or any officer of the Louisiana Professional Engineering and Land Surveying Board.~~

H I. If the secretary of state receives for filing articles of ~~incorporation~~ organization that include in the corporate name the word "architect", "architectural", or "architecture", the secretary of state shall not file the articles of ~~incorporation~~ organization until the secretary of state receives either of the following:

(1) Satisfactory evidence that written notice of the proposed use of that name was delivered to the Louisiana State Board of Architectural Examiners at least ten days earlier.

(2) A written waiver of the ten-day notice requirement, signed by the executive director or any member of the Louisiana State Board of Architectural Examiners.

I J. The assumption or use of a name in violation of this Section does not affect or vitiate the ~~corporate~~ limited liability company's existence.

At this time, Professor Morris concluded his presentation, and the Friday session of the November 2018 Council meeting was adjourned.

LOUISIANA STATE LAW INSTITUTE

MEETING OF THE COUNCIL

November 9-10, 2018

Saturday, November 10, 2018

Persons Present:

Adams, Marguerite (Peggy) L.	Mengis, Joseph W.
Bergstedt, Thomas M.	Miller, Cody "C.J."
Braun, Jessica	Norman, Rick J.
Carroll, Andrea B.	North, Donald W.
Cromwell, L. David	Riviere, Christopher H.
Davrados, Nick	Scalise, Ronald J., Jr.
Dawkins, Robert G.	Sole, Emmett C., Jr.
Dimos, Jimmy N.	Talley, Susan G.
Doguet, Andre'	Tate, George J.
Garrett, J. David	Thibeaux, Robert P.
Hebert, Christopher B.	Thibodeaux, Catherine Parsiola
Hogan, Lila T.	Tucker, Zeldia W.
Holdridge, Guy	Vance, Shawn D.
Jewell, John Wayne	Waller, Mallory
Johnson, Pamela Taylor	Woodruff-White, Lisa
Kostelka, Robert "Bob" W.	

President Susan G. Talley called the Saturday Session of the November 2018 Council meeting to order at 9:00 a.m. on Saturday, November 10, 2018, at the Louisiana Supreme Court in New Orleans. The President called on Professor Andrea B. Carroll, Reporter of the Marriage-Persons Committee, to begin her presentation of materials on parenting coordinators.

Marriage-Persons Committee

Professor Carroll began her presentation by reminding the Council that the parenting coordinator statutes were first proposed by the Law Institute in 2007 and thereafter enacted by the legislature. After a decade of use, practitioners have asked for several revisions, including allowing attorneys to serve as parenting coordinators and to make their decisions binding. At the Council meeting in December of 2017, several proposals were approved, and several proposals were recommitted. The Reporter first asked the Council to revisit R.S. 9:358.1(C) to address a concern brought to her attention by a judge. The intent of the provision is to allow parenting coordinators who are hired by the court to be appointed to certain cases even if the parties are unable to pay. However, "court staff" is a broader term, and there are limits and restrictions placed on possible interactions with litigants who have cases pending before the court. Therefore, the Reporter asked the Council to adopt clarifying language, and the following was approved:

R.S. 9:358.1. Appointment of parenting coordinator; term; costs

* * *

C. The court shall ~~order each party to pay a portion of~~ apportion the costs of the parenting coordinator between the parties and may reassess costs upon the motion of a party or upon the written recommendation of the parenting coordinator after a hearing. No parenting coordinator shall be appointed by the court if ~~a party has~~ both parties have been granted pauper status or is are unable to pay his their apportioned ~~cost~~ costs of the parenting coordinator, unless the parenting coordinator volunteers on a pro bono basis or is a court employee designated by the court as a parenting coordinator.

Professor Carroll explained that the next statute, R.S. 9:358.5, addresses the complaint that without teeth in the law, the statute is ineffective. Last year, the Committee proposed making the recommendations binding immediately but not effective until ordered by the court. The Council rejected this notion and asked the Committee to consider balancing minor and major decisions with the temporal issues regarding effectiveness. Subsection A addresses how decisions are made and communicated to the parties. One Council member pointed out that judges do not receive notice of everything that is filed in a suit record, so the Reporter accepted an amendment to clarify the language. The Council also suggested changing the proposal to the active voice to eliminate any confusion regarding who has the duty to notify. R.S. 9:358.5(A) will read as follows:

R.S. 9:358.5. Decisions and recommendations of parenting coordinator; form and binding effect; judicial review

A. The parenting coordinator's decisions or recommendations and findings of fact shall be made in writing and shall be dated and signed by the parenting coordinator. The parenting coordinator shall file his decisions and recommendations with the clerk of court in the suit record and the judge, the parties, and counsel for the parties shall be notified immediately. No later than ten days after filing, the parenting coordinator shall mail his decisions and recommendations to the parties or to counsel for the parties, if any.

The Reporter then explained that R.S. 9:358.5(B) is the heart of the entire package. At the December 2017 Council meeting, members suggested splitting up the issues as minor and major and allowing minor decisions to be immediately binding, but requiring court approval for more substantive decisions. The Committee's revised proposal provides that if parties agree or if the court finds good cause, parenting coordinator decisions may be immediately binding. In all other cases, the recommendations of the parenting coordinator will be effective upon court order. This approach provides teeth but balances the parties' rights to access the courts. The Council questioned the exception for local court rules and decided that because the court makes the decision to appoint a parenting coordinator in the first place, once they do so, they should not have the option of opting out of the governing statutes. Therefore, the following was adopted:

R.S. 9:358.5. Decisions and recommendations of parenting coordinator; form and binding effect; judicial review

* * *

B. When the parties agree in a consent judgment or when the court finds good cause, a parenting coordinator shall have the authority to make binding decisions as to the matters provided for in R.S. 9:358.4. All binding decisions shall be effective upon filing and shall continue in effect until vacated or amended, or until an order is entered by a court pursuant to a de novo hearing in accordance with Subsection C of this Section. If the parenting coordinator does not have the authority to make binding decisions, the parenting coordinator's recommendations will be effective only upon order of the court.

Next, the Council discussed R.S. 9:358.5(C) and found an issue related to seeking or appealing a court order based on a parenting coordinator's recommendation. The Committee intended for decisions to be immediately binding with any de novo hearing within 30 days and any recommendations made effective by order of the court to be reviewed de novo within 30 days of issuance of the order. However, the proposal is not clear. The Council also questioned whether the court review is conducted ex parte or by contradictory hearing, as well as what the consequences are for failing to adhere to a recommendation. The Council recommitted this Subsection and asked the Committee to draft language creating a procedure to make a recommendation of a parenting coordinator binding.

Professor Carroll then explained that proposed R.S. 9:358.5(D) authorizes the court to award attorney fees and costs in certain circumstances. However, the Council was uncomfortable with such an award when a party challenges a recommendation that does not become binding except upon hearing and order of the court. The Council also voted to delete the word "substantially" due to the uncertainty surrounding its meaning. The Reporter also agreed to add a Comment to explain why this Subsection only applies when binding decisions are challenged. The following was approved:

R.S. 9:358.5. Decisions and recommendations of parenting coordinator; form and binding effect; judicial review

* * *

D. If the court upholds the decision of the parenting coordinator, the party that requested the de novo hearing shall pay the fees and costs of the other party and shall pay the fees and costs incurred by the parenting coordinator in connection with the request for de novo hearing, unless good cause is shown.

Moving to R.S. 9:358.4, Professor Carroll explained that this proposal contains two different lists of the issues the parenting coordinator can help the parties resolve, depending upon whether a domiciliary parent has been designated by the court. The Committee was mindful of possible erosion of the authority of the domiciliary parent. The Council discussed further distinction by having Subsection A apply when a parenting coordinator can resolve disputes and Subsection B address when a parenting coordinator can assist the parties in reaching agreements. They also discussed at length the nature of the lists by debating whether hot button issues such as cell phones, tattoos, social media, or driving should be added or if these lists should be more general, thereby placing the burden on the court to specify the authority of the parenting coordinator on a case-by-case basis. In Subsection B, a member of the Council suggested precluding the decisions that can be resolved under Subsection A to create flexibility without undermining the effect by being illustrative. Others expressed support for the illustrative nature and discretion of the court. The Council recommitted Subsections A and B to the Committee but did vote to restore Paragraph (A)(15) regarding the child's contact with others. They also quickly approved new proposed Subsection C and the deletion of present Subsection C.

The Reporter next presented R.S. 9:358.6. Subsection A was quickly adopted, and the Council began questioning Subsection B. The Reporter accepted friendly amendments to clarify that an in camera hearing is necessary to determine if the notes should be disclosed, and the following was adopted:

R.S. 9:358.6. Testimony and report confidentiality

A. ~~The~~ With prior written notice to the parties, the court may call the parenting coordinator ~~shall not be called~~ as a witness in the a child custody proceeding. A party may not call the parenting coordinator as a witness without prior court approval.

B. ~~The parenting coordinator shall distribute all reports to the court, the parties, and their attorneys.~~ Notes, records, and recollections of a parenting coordinator are confidential and may not be disclosed unless one of the following applies:

(1) The parties and the parenting coordinator agree in writing to the disclosure.

(2) Disclosure is required by law or other applicable professional code. Notes and records of a parenting coordinator may not be disclosed under this Paragraph unless the court reviews the material in camera and determines after a hearing that they should be disclosed.

(3) Otherwise ordered by the court.

With respect to R.S. 9:358.7, the Council was concerned that the language implies that in an emergency, the court shall be notified and the other party shall not be notified. The Reporter stated that the Committee only intended this provision to mean that it is not necessary to notify the other party due to the nature of emergencies, but if they can be notified, it certainly is not prohibited. The Council changed "shall" to "may" and adopted the following:

R.S. 9:358.7. Communication with court

The parenting coordinator shall not communicate ex parte with the court, except in an emergency situation. The parenting coordinator may inform the court of an emergency situation without notice to the parties.

The Reporter then explained that the change in R.S. 9:358.8 simply deletes unnecessary language, and the Council approved but asked for a Comment to note that a change in the law is not intended. R.S. 9:358.9 and 358.10 are merely sequential numerical changes and were approved without discussion to complete the material.

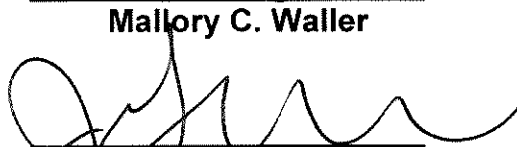
At this time, Professor Carroll concluded her presentation, and the November 2018 Council meeting was adjourned.



Nick Kunkel



Mallory C. Waller



Jessica G. Braun