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March 9, 2018

Representative Taylor Barras
Speaker of the House of Representatives
P.O. Box 94062
Baton Rouge, Louisiana 70804


Senator John A. Alario, Jr.
President of the Senate
P.O. Box 94183
Baton Rouge, Louisiana 70804

**RE: HOUSE CONCURRENT RESOLUTION NO. 2 OF THE 2017 REGULAR
SESSION**

Dear Mr. Speaker and Mr. President:

The Louisiana State Law Institute respectfully submits herewith its report to the legislature relative to continuing tutorship and emancipation.

Sincerely,


William E. Crawford
Director

WEC/puc

Enclosure

cc: Representative Franklin J. Foil

email cc: David R. Poynter Legislative Research Library
drplibrary@legis.la.us
Secretary of State, Mr. Tom Schedler
admin@sos.louisiana.gov

**LOUISIANA STATE LAW INSTITUTE
MARRIAGE-PERSONS COMMITTEE**

**REPORT TO THE LEGISLATURE
IN RESPONSE TO HCR NO. 2 OF THE 2017 REGULAR SESSION**

Relative to continuing tutorship and emancipation

Prepared for the
Louisiana Legislature on

March 9, 2018

Baton Rouge, Louisiana

**LOUISIANA STATE LAW INSTITUTE
MARRIAGE-PERSONS COMMITTEE**

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Katherine S. Spaht, Chair

Andrea B. Carroll, Reporter

Jessica G. Braun, Attorney

2017 Regular Session

HOUSE CONCURRENT RESOLUTION NO. 2

BY REPRESENTATIVE FOIL

A CONCURRENT RESOLUTION

To authorize and request the Louisiana State Law Institute to study and make recommendations regarding the 2009 legislative changes to the laws of tutorship and emancipation.

WHEREAS, it is of the utmost importance to protect those individuals who lack the necessary mental ability to administer their own estates; and

WHEREAS, one of the articles relied upon for tutorship, Civil Code Article 359, places restrictions on "the legal capacity of a person with intellectual disability to that of a permanent minor, except that after the age of eighteen the person, unless formally interdicted, shall have the legal capacity of a minor who has been granted the emancipation conferring the power of administration as set forth in Chapter 2, Section 2 of this Book and Title"; and

WHEREAS, those articles which are referenced in Civil Code Article 359, and which governed the emancipation process until 2009, have been repealed by the revision of the emancipation articles by Acts 2008, No. 786, §1, which became effective January 1, 2009; and

WHEREAS, in the case of *In re Continuing Tutorship of Mitchell Layne Franques*, 74 So.3d 812 (La. App. 3 Cir. 2011), the Louisiana Third Circuit Appellate Court held that a person placed under a continuing tutorship who reached age eighteen years prior to the 2009 revision of those emancipation articles has been granted emancipation conferring the power of administration authorized by those repealed articles; and

WHEREAS, given the *Franques* decision, those under continuing tutorship prior to the 2009 change in the law may be legally able to enter into contracts and obligations for which they lack the mental capability.

THEREFORE, BE IT RESOLVED by the Legislature of Louisiana that the Louisiana State Law Institute study the laws of continuing tutorship and emancipation to establish procedures for those under a continuing tutorship and to address the needed protections for those individuals placed under a continuing tutorship prior to the legislative revisions of 2009.

BE IT FURTHER RESOLVED that a suitable copy of this Resolution be transmitted to the director of the Louisiana State Law Institute and that the Louisiana State Law Institute reports its findings and recommendations to the Legislature of Louisiana on or before January 1, 2018.

SPEAKER OF THE HOUSE OF REPRESENTATIVES

PRESIDENT OF THE SENATE

March 9, 2018

To: Representative Taylor Barras
Speaker of the House of Representatives
P.O. Box 94062
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**REPORT TO THE LEGISLATURE
IN RESPONSE TO HCR NO. 2 OF THE 2017 REGULAR SESSION**

House Concurrent Resolution No. 2 of the 2017 Regular Session urged and requested the Louisiana State Law Institute to study the laws of continuing tutorship and emancipation to establish procedures for those under a continuing tutorship and to address the needed protections for individuals placed under a continuing tutorship prior to recent legislative revisions. Pursuant to this resolution, the Law Institute assigned the project to the Marriage-Persons Committee, which is led by Professor Andrea B. Carroll as Reporter and is comprised of judges, practitioners, and law professors with expertise in this area.

The Committee met and conducted research with regard to the law prior to the 2008 legislative revisions and the relevant case law. After several meetings, the Committee recommended eliminating the provision stating that a person under continuing tutorship retains the powers of a minor operating under "emancipation conferring the power of administration" because this concept was previously eliminated from Louisiana law. The intent of this proposed change is to make clear that continuing tutorship provides for restrictions on legal capacity akin to those applicable to minors, subject to the provisions of Civil Code Article 361, which gives the court discretion to modify the decree of tutorship to provide the minor with the capacity to engage in some juridical acts. After the Committee received Council approval of its proposals, the Law Institute submitted its recommendations as House Bill No. 395 of the 2018 Regular Session, a copy of which is attached to this report.

While exploring this area of the law, the Marriage-Persons Committee discovered numerous other issues within the continuing tutorship regime that need attention. As a result, the Committee will continue reviewing these areas of concern with a view toward recommending additional legislative changes during the 2019 Regular Session.

2018 Regular Session

HOUSE BILL NO. 395

BY REPRESENTATIVE FOIL

(On Recommendation of the Louisiana State Law Institute)

CHILDREN/TUTORSHIP: Provides relative to tutorship

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AN ACT

To amend and reenact Civil Code Articles 355, 359 and 361, relative to continuing tutorship; to provide for restrictions on legal capacity; to provide for modification or termination of decrees restricting legal capacity; to provide for prospective and retroactive application; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. Civil Code Articles 355, 359, and 361 are hereby amended and reenacted to read as follows:

Art. 355. Petition for continuing or permanent tutorship

When a person above the age of fifteen possesses less than two-thirds of the intellectual functioning of a person of the same age with average intellectual functioning, evidenced by standard testing procedures administered by competent persons or other relevant evidence acceptable to the court, the parents of such person, or the person entitled to custody or tutorship if one or both parents are dead, incapacitated, or an absent person, or if the parents are judicially separated or divorced, may, with the written concurrence of the coroner of the parish of the intellectually disabled person's domicile, petition the court of that district to place such person under a continuing tutorship which shall not automatically end at any age but shall continue until revoked by the court of domicile. The petitioner shall not bear the coroner's costs or fees associated with securing the coroner's concurrence.

* * *

1 Art. 359. Restriction on legal capacity

2 The decree if granted shall restrict the legal capacity of the person with an
3 intellectual disability to that of a permanent minor, ~~except that after the age of~~
4 ~~eighteen the person, unless formally interdicted, shall have the legal capacity of a~~
5 ~~minor who has been granted the emancipation conferring the power of administration~~
6 ~~as set forth in Chapter 2, Section 2 of this Book and Title.~~

7 Revision Comments - 2018

8 The 2018 revision eliminates the provision that a person under continuing
9 tutorship retains the powers of a minor operating under "emancipation conferring the
10 power of administration." The concept of emancipation conferring the power of
11 administration was eliminated from Louisiana law in the 2008 revision of the
12 Louisiana Civil Code. Today, both emancipation and interdiction may be limited or
13 full. The revision is intended to make clear that continuing tutorship provides for
14 restrictions on legal capacity akin to those applying to minors, with the possibility
15 that the court may modify the decree of tutorship under Article 361 to provide the
16 minor with capacity to engage in some juridical acts.

17 * * *

18 Art. 361. Contest of decree restricting legal capacity.

19 The decree restricting his legal capacity may be contested in the court of
20 domicile by the person himself or by anyone adversely affected by the decree, ~~and~~
21 ~~upon evidence which would justify the full emancipation of a minor above the age~~
22 ~~of eighteen the decree shall be rescinded and set aside. For good cause, the court~~
23 may modify or terminate the decree restricting legal capacity.

24 Revision Comments - 2018

25 (a) The standard of good cause for modifying or terminating a decree of
26 continuing or permanent tutorship is drawn from the modification standard in
27 interdiction. See Article 397.

28 (b) The Civil Code provides for the limited emancipation of a minor by
29 authentic act, which gives the minor the capacity to make only the juridical acts
30 specified in the authentic act. See Article 368. "The parties may provide that the
31 emancipated minor has the capacity to execute all juridical acts, or certain kinds of
32 juridical acts, or only specific juridical acts." *Id.*, at cmt. (b). In the continuing
33 tutorship context, the court's ability to modify the decree of permanent tutorship to
34 permit the minor to make some juridical acts mirrors the possibility of the
35 emancipated minor's capacity to execute some acts. See also Article 395 (providing
36 for the capacity of limited interdicts).

37 Section 2. The provisions of this Act shall be given prospective and retroactive
38 application.

DIGEST

The digest printed below was prepared by House Legislative Services. It constitutes no part of the legislative instrument. The keyword, one-liner, abstract, and digest do not constitute part of the law or proof or indicia of legislative intent. [R.S. 1:13(B) and 24:177(E)]

HB 395 Original

2018 Regular Session

Foil

Abstract: Provides for restrictions on legal capacity for persons with intellectual disabilities.

Present law (C.C. Art. 355) requires the concurrence of the coroner for the filing of a petition for continuing tutorship.

Proposed law retains present law but requires the coroner's concurrence to be written.

Present law (C.C. Art. 359) provides for restrictions on legal capacity and exceptions to those restrictions.

Proposed law retains present law but eliminates the exception stating that a person with intellectual disabilities over the age of eighteen has the legal capacity of minor operating under emancipation conferring the power of administration.

Present law (C.C. Art. 361) provides that a decree restricting legal capacity may be contested in court and provides for the standard of proof.

Proposed law retains present law but replaces the standard of proof with good cause.

(Amends C.C. Arts. 355, 359 and 361)