



LOUISIANA STATE LAW INSTITUTE
PAUL M. HEBERT LAW CENTER, ROOM W 127
UNIVERSITY STATION
BATON ROUGE, LA 70803-1016

OFFICE OF
THE DIRECTOR
(225) 578-0200
FAX: (225) 578-0211
EMAIL: LAWINSTITUTE@LSLI.ORG

June 4, 2019

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 its additional report to the legislature relative to continuing tutorship.

Sincerely,

Guy Holdridge
Director

cc: Representative Franklin Foil

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

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

**ADDITIONAL REPORT TO THE LEGISLATURE
CONCERNING HCR NO. 2 OF THE 2017 REGULAR SESSION**

Relative to continuing tutorship

Prepared for the
Louisiana Legislature on

June 4, 2019

Baton Rouge, Louisiana

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

Dawn Amacker, Covington

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which are referenced in Civil Code Article 359, and which governed the emancipation process until 2009, have been repealed by the revision of the emancipation articles by Acts 2008, No. 786, §1, which became effective January 1, 2009; and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

LOUISIANA HOUSE OF REPRESENTATIVES

412 N. 4th Street, Ste. 220
Baton Rouge, LA 70802
Phone: (225) 342-6777
Fax: (225) 342-6785
Email: foilf@legis.la.gov



Appropriations, Vice Chair
Natural Resources and Environment
House Select Committee on Homeland Security
Chairman
Joint Legislative Committee on the Budget
Special Committee on Military & Veterans Affairs

FRANKLIN J. FOIL
State Representative ~ District 70

February 7, 2018

Ms. Andrea Carroll
Mr. William Crawford
Paul M. Hebert Law Center
1 East Campus Drive
Baton Rouge, LA 70803

Dear Ms. Carroll and Mr. Crawford,

As you know, I authored HCR 2 during the 2017 legislative session to ask the Louisiana State Law Institute to study a particular problem in the context of continuing tutorship. Specifically, the Resolution asks the Law Institute to consider whether a change to article 359 of the Civil Code is warranted, in light of the elimination of the concept of "emancipation conferring the power of administration" from Louisiana law, and in light of Louisiana jurisprudence interpreting that article.

I understand that the Law Institute has undertaken a study of the continuing tutorship articles of the Civil Code, and is proposing a bill this legislative session that recommends modifications and improvements to Louisiana law on this point. Professor Carroll also communicated to me that during their meetings on the matter, the Marriage & Persons Committee found some other potential problems with the regime of continuing tutorship that it would like to further study, with a view toward proposing some legislative improvements. Those issues include the necessity that the coroner concur in a petition to establish a continuing tutorship, whether an attorney should be appointed for the individual to be placed under continuing tutorship, and the continued desirability of maintaining a regime of continuing tutorship alongside interdiction.

Rather than authoring an additional legislative Resolution on this matter, I ask that the Law Institute interpret HCR 2 broadly as a request that the Marriage & Persons Committee study the issues raised above, and any other issues it may identify in the law of continuing tutorship, as well. I consider continuing work the Committee may engage in on this topic to fall under the ambit of HCR 2.

Sincerely,

A handwritten signature in black ink, appearing to read "Franklin J. Foil". The signature is written in a cursive, flowing style with some loops and flourishes.

Franklin J. Foil

June 4, 2019

To: 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
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**ADDITIONAL REPORT TO THE LEGISLATURE CONCERNING
HCR NO. 2 OF THE 2017 REGULAR SESSION ON CONTINUING TUTORSHIP**

House Concurrent Resolution No. 2 of the 2017 Regular Session requested the Louisiana State Law Institute to study the laws of continuing tutorship and emancipation and to establish procedures for those under a continuing tutorship and to address the needed protections for individuals placed under a continuing tutorship prior to the legislative revisions of 2009. In response to this resolution, and upon the recommendation of the Louisiana State Law Institute, House Bill No. 395 was filed during the 2018 Regular Session and became Acts 2018, No. 164. Representative Foil also requested, by letter dated February 7, 2018, that the Law Institute interpret House Concurrent Resolution No. 2 broadly to study additional issues related to continuing tutorship.

Pursuant to this request, the Law Institute's Marriage-Persons Committee, which is led by Professor Andrea B. Carroll as Reporter and is comprised of judges, lawyers, and law professors with expertise in this area, met and conducted research with regard to the law and the relevant jurisprudence. After several months of review, the Committee recommended, and the Council approved, authorizing parents who have never been married to each other to petition for continuing tutorship, authorizing the appointment of parents as co-tutors when they petition jointly or when it is in the best interest of the child, and authorizing the appointment of a tutor when one parent is dead, when the parents are divorced or judicially separated, and when the parents were never married to each other.

The Law Institute's recommendations are contained in the following proposed bill. Copies of Representative Foil's letter and House Concurrent Resolution No. 2 of the 2017 Regular Session are also attached.

20__ Regular Session

HOUSE/SENATE BILL NO.

BY REPRESENTATIVE/SENATOR

(On Recommendation of the Louisiana State Law Institute)

CHILDREN/TUTORSHIP: Provides for the petition and the naming of tutors for persons with intellectual disabilities

1 AN ACT

2 To amend and reenact Civil Code Articles 355 and 356, relative to continuing tutorship; to provide
3 for the filing of a petition; to provide for the appointment of tutors; to provide for the
4 appointment of co-tutors; and to provide for related matters.

5 Be it enacted by the Legislature of Louisiana:

6 Section 1. Civil Code Articles 355 and 356 are hereby amended and reenacted to read as
7 follows:

8 Art. 355. Petition for continuing or permanent tutorship

9 When a person above the age of fifteen possesses less than two-thirds of the
10 intellectual functioning of a person of the same age with average intellectual functioning,
11 evidenced by standard testing procedures administered by competent persons or other
12 relevant evidence acceptable to the court, the parents of such person, or the person entitled
13 to custody or tutorship if one or both parents are dead, incapacitated, or ~~an absent person,~~
14 persons or if the parents are judicially separated or divorced or have never been married to
15 each other, may, with the written concurrence of the coroner of the parish of the

1 intellectually disabled person's domicile, petition the court of that district to place such
2 person under a continuing tutorship which shall not automatically end at any age but shall
3 continue until revoked by the court of domicile. The petitioner shall not bear the coroner's
4 costs or fees associated with securing the coroner's concurrence.

5 Art. 356. Title of proceedings; procedural rules; ~~parents as tutor and undertutor~~ parent to
6 be named tutor

7 The title of the proceedings shall be Continuing Tutorship of (Name of Person), A
8 Person with an Intellectual Disability.

9 (1) When the person to be placed under the continuing tutorship is above the age
10 of fifteen, and under the age of majority, the proceeding shall be conducted according to
11 the procedural rules established for ordinary tutorships.

12 (2) When the person to be placed under the continuing tutorship is above the age
13 of majority, the proceeding shall be conducted according to the procedural rules established
14 for interdictions.

15 (3) ~~Upon the petition of both~~ When the parents of the ~~mentally deficient~~ person
16 ~~during their marriage one parent shall be named as tutor and the other as undertutor~~ to be
17 placed under the continuing tutorship are married to each other and petition jointly, the
18 court shall appoint the parents as co-tutors, unless for good reasons cause the judge court
19 decrees otherwise.

20 (4) When the parents of the person to be placed under the continuing tutorship are
21 married to each other but do not petition jointly, the court shall appoint either a petitioning
22 parent as tutor or both individually petitioning parents as co-tutors, in accordance with the

1 best interest of the child.

2 (5) Upon the petition of a parent of the person to be placed under the continuing
3 tutorship, the court shall, unless good cause requires otherwise, appoint as tutor the
4 petitioning parent who is:

5 (a) The surviving parent, if one parent is dead.

6 (b) The parent awarded custody during minority of the person to be placed under
7 the continuing tutorship, if the parents are divorced or judicially separated.

8 (c) The parent who was tutor or tutrix during minority, if the parents were never
9 married to each other.

10 Revision Comments – 20__

11 (a) Subparagraph (5) incorporates Louisiana’s child custody rules. See, e.g.,
12 Articles 131 through 135. Although there are no provisions of law addressing custody of
13 an adult descendant, for the purposes of this Article, the custodial determination made
14 during minority informs the naming of a tutor for a major placed under continuing
15 tutorship.

16
17 (b) See also Article 273 (requiring an undertutor in all cases). It may be appropriate
18 for the court to name one parent tutor and the other undertutor under this Article.

19
20 (c) Under Subsubparagraph (5)(b), a parent with sole custody who petitions may be
21 named tutor of the person to be placed under continuing tutorship. Likewise, parents with
22 joint custody may be named co-tutors if each petitions. The rule established here is intended
23 to approximate that applicable to tutorship during minority. See, e.g., Article 250 (making
24 parents with joint custody co-tutors unless otherwise ordered by the court).

DIGEST

The digest printed below was prepared by the Louisiana State Law Institute. 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/SB

20__ Regular Session

Author

Abstract: Provides for petitioning and appointing tutors for persons with intellectual disabilities.

Present law (C.C. Art. 355) authorizes the parents or legal custodians of a person with intellectual disabilities to petition for continuing tutorship.

Proposed law retains present law and additionally authorizes parents who have never been married to each other to petition for continuing tutorship.

Present law (C.C. Art. 356) requires the court to name one parent as tutor and the other parent as undertutor.

Proposed law changes present law to allow the court to name parents co-tutors when they petition jointly or when it is in the best interest of the child.

Proposed law also provides for the naming of a tutor when one parent is dead, when the parents are divorced or judicially separated, and when the parents were never married to each other.

(Amends C.C. Arts. 355 and 356)