



**Volume XXII**

**No. 3**

**Winter 2006**

Published in lieu of Summer 2005 issue.

A newsletter published three times a year dedicated to the enhancement of notarial professionalism in Louisiana

Katrina's aftermath did not spare *Louisiana Notary's* editing and production schedule. This issue contains the information you'd have gotten in the Summer 2005 issue, and will be followed soon by another issue to replace the Fall 2005 issue. You will receive the full number of issues for which you subscribed. I appreciate very much your patience and understanding.

—Alan Jennings, editor

## LEGISLATION OF INTEREST

The laws governing Louisiana notaries public saw only minor changes in 2005, but the revisions to the laws of registry and other acts of the 2005 regular legislative session will be of special interest to notaries.

### Revisions to laws of registry

Act 169, originally HB 214 by Rep. Rick Gallot, was introduced on recommendation of the Louisiana State Law Institute. For all its verbiage, it didn't change much, but it consolidates and restates much of the old law in better form and in fewer places.

Scheduled to take effect on January 1, its implementation was delayed by Act 13 of the post-Katrina 2005 special session. The act now will become effective July 1, 2006.

Of particular interest to notaries will be the new Civil Code article 3352. It requires a declaration as to whether there has been a change in the marital status of any party who is a transferor of the immovable or interest or right since he acquired it, and if so, when and in what manner the change occurred. The new law retains recently added requirements requiring printed names of the notary, witnesses, and notary ID number. The new article restates with minor changes the current

technical requirements of appearance clauses and signature identification in recorded instruments. The instrument must contain the full name, domicile, and postal address of the parties, and must recite the marital status, including the full name of a current spouse.

This act also repeals provisions authorizing the cancellation of a mortgage based on an affidavit of lost note made by the mortgagor. If this repeal becomes effective, it will significantly change the requirements for a mortgagor to cancel a mortgage if he misplaces that note marked "paid" returned to him by the lender. Under the new law, the clerk can cancel the mortgage only upon receipt of the original note marked "paid" or a release from the lender. Where a commercial lender is involved, this presents little problem for the mortgagor. But where the lender is an individual, no other person may issue the necessary release; the mortgagor who misplaces his paid note, or who does not receive a paid note from the lender, will be required to obtain a re-

lease from the original mortgagee, or file a mandamus action and obtain a judgment of the court for cancellation of the mortgage.

No changes were made to the laws charging notaries with the duty to record certain acts. This duty is a fundamental component of our public records doctrine. But at the request of interested notaries and the secretary of state, the legislature (see HCR 158) urged the law institute to address some of the problems notaries and commercial lenders have with the current laws and make recommendations to the legislature for the 2006 regular session.

### **Iberville Parish added to capital area parishes group**

Act 84 amends R.S. 35:191.N. Effective August 15, 2005, notaries commissioned in and for Iberville parish will be authorized to exercise all the functions of office in the parishes of Ascension, East Baton Rouge, East Feliciana, Livingston, Pointe Coupee, West Baton Rouge, and West Feliciana. And notaries in all these parishes will be able to do the same in Iberville parish.

Rep. Karen St. Germain introduced House Bill 363 on behalf of a notary commissioned in February in Iberville Parish. The Iberville notary had sought a dual commission in East Baton Rouge, but the court turned down her request for examination waiver.

East Baton Rouge court policy requires all notary applicants (except attorneys and those expressly exempt from testing under law) to take and pass the current notary public examination before the court will issue the certificate of qualification and competency required for the appointment.

### **Paternity acknowledgment**

Act 192, originally HB 91 by Rep. Glenn Ansardi, was introduced on recommendation of the Law Institute. By this act, provisions relating to acknowledging paternity by authentic act have been moved around and re-worded a bit. A new C.C. art. 196 replaces former C.C. art. 203 (now repealed) as the operative article concerning filiation by acknowledgment of paternity. The new article provides that a man may acknowledge a child as his own by authentic act or by signing the birth certificate, as long as another man has not filiated the child. But this kind of acknowledgment creates the presumption that the man is the child's father only as it may benefit the child. There is an exception for cases handled by Support Enforcement Services, where such an acknowledgement will operate to give the man parental rights without a judicial determination of paternity.

Also repealed by Act 192 was Civil Code article 206, which provided for rescinding an acknowledgment of paternity. Legislation intended to bring this provision forward was inadvertently omitted, and will be offered in the 2006 regular session.

### **Clerks of Court notarial powers**

Act 64. This item comes with another sigh of frustration over some poor language added by the senate at the last minute to Rep. J.R. Smith's House Bill 506.

Smith's bill amending R.S. 35:392.1.(B) was intended to clarify the authority of the clerks of court and deputy clerks in the employ of the clerk to perform signature notary services while at work. The bill was necessary because the attorney general was of the opinion (Op.Atty.Gen #04-0145A) that the language added by Act 1142 in 2004 was insufficient.

At the 11th hour, Smith's bill caught the eye of Senator Robert Barham of Oak

Ridge. The senator, who is a regularly commissioned notary, thought the bill still left clerks with too much authority. The senate floor amendment struck out the house language in its entirety and added to the existing subsection the following:

However, nothing in this Section shall prohibit such clerks and deputy clerks from notarizing vehicle titles or acknowledging the signatures on authentic acts even if such authentic acts are not within the course and scope of their employment.

The language is awkward, but the result is that the bill—as passed—actually restored less of the clerk’s historical notarial authority than Smith’s bill originally intended.

Under the new law, the clerks and their employee deputy clerks may certainly sign title assignments on the notary line. Although the phrase “acknowledging the signatures on authentic acts” isn’t exactly clear to me, I suspect that it permits them to sign authentic acts as a notary on- or off-the-job.

According to the clerks of court legislative liaison Debbie Hudnall, the clerks simply want to be able to provide signature notary services to the public across the counter at the courthouse. Also, they need to be able to send deputy clerks to the jails to handle verifications and affidavits for inmates at local jails.

Neither of these services causes any problem for regularly commissioned notaries. But the language added by Act 64 leaves the clerks powerless to do some of these things, yet probably empowers deputy clerks to do some things that the clerks will wish they hadn’t.

Clerks seem to be aware that the real problem with this legislation is that its poor language creates a liability issue, exposing them to claims from constituents who wind up with paperwork that might be invalid because of lack of proper form.

Regardless, I’m hopeful (though not taking any bets) that we’ve seen the last of the legislation on this subject.

### **Video testaments**

The authentic act is proof of its contents. Or is it?

It all depends on whether you know what you’re doing. If you do, this gem offers you a real revenue-positive service opportunity.

Act 79, originally HB 260 by Rep. Willie Hunter, adds a provision to the Code of Civil Procedure that allows admission of a videotape as evidence in a contradictory trial to probate a testament under Article 2901 or an action to annul a probated testament under Article 2931. The videotape is admissible if the testator is sworn by a person authorized to take oaths and the oath is recorded on the videotape.

The videotape of the execution and reading of the testament by the testator may be admissible as evidence of any of the following:

- (1) The proper execution of the testament.
- (2) The intentions of the testator.
- (3) The mental state or capacity of the testator.
- (4) The authenticity of the testament.
- (5) Matters that are determined by a court to be relevant to the probate of the testament.

Such a tape can be very useful to one side or the other in a conflagration of heirs and legatees over who gets what part of Uncle Buck’s bucks. The possibility of those kinds of battles is an excellent reason for being judicious when presiding at the execution of a testament. If you believe there will be a challenge, a video recording will be helpful in showing that you did it right and the testator was of proper capacity.

## FORMS

### Non-legal custodian affidavit

Since 2001, Louisiana law allows a “non-legal custodian” to give consent for a child to receive medical or educational services for which parental consent is usually required. This non-legal custodian must have executed an affidavit that complies with La. R.S. 9:975. Under La. R.S. 9:975, a person who acts in good-faith reliance on the affidavit provided will generally not be subject to civil liability, criminal prosecution, or professional disciplinary proceedings for acting without the knowledge or consent of the parent or natural tutor.

According to the statute, the declaration does not affect the rights of the child’s parent or legal guardian regarding the care, custody, and control of the child, and does not mean that the non-legal custodian has legal custody of the child. Further, a person who relies on a proper non-legal-custodian affidavit has no obligation to make any further inquiry or investigation. An affidavit under this section is not valid for more than one year after it is executed.

If the child stops living with the non-legal custodian, the custodian must notify anyone to whom he has given (or anyone he knows has received) an affidavit under this

statute that the child no longer lives with him.

A school district may require additional reasonable evidence that the non-legal custodian lives at the address provided.

### Special information for preparing this instrument:

1. The warning statement is required under the statute, and must be in a bold typeface that is at least 10-point, and must be in a box with 3-point rule lines.
2. Lines indicated with an asterisk(\*) must be included to authorize any non-school-related medical services for the child.
3. The form in the statute does not involve a sworn statement or provide for the signature of a notary or other officer authorized to administer an oath. The form provided in this newsletter is substantially similar to the statutory form but casts the declaration of the affiant as a sworn statement and provides for notary signature.
4. The statutory form includes the notices following the signature.

## QUESTIONS I HAVE BEEN ASKED

### Stamped disclaimers

**Question:** I have a client that came to me with an already-typed prenuptial contract. I do not want to be responsible for what is written in that contract. Can I make a statement at the bottom of the contract stating that I am only notarizing the appearers and the witness that are here for the signature, and is there a certain statement I should use if it is possible to do so? The client is also going to take the papers to be filed at the courthouse.

**Answer:** Under Louisiana case law, you’re not responsible for anything you didn’t write.

There is no law in Louisiana which requires a notary to give inspection for legal flaws and guaranty validity of every document which he notarizes when he is hired only in his capacity of a notary and not as a drafter or guarantor of validity of such documents. *Dale v. Carriere* 537 So.2d 346 (La App. 4th Cir. 1988), *writ den.* (La. 1989).

Disclaimers stamped on a page, however,

*(Continued on page 6)*

NON-LEGAL CUSTODIAN'S AFFIDAVIT

R.S. 9:975.

State of Louisiana

Parish of \_\_\_\_\_

Before me, the undersigned notary public, duly commissioned and qualified [in and] for the state and parish aforesaid, personally came and appeared

[Name of affiant]

Who, being duly sworn, did declare and say:

I am a person of the full age of majority and my full home address is [complete street address of affiant]. My date of birth is [date of birth of affiant] and my Louisiana driver's license number or state identification card number is [number].

The minor child [full name of child] whose date of birth is [date of birth of child] lives in my home at the address just given.

- \* I am a non-legal custodian of this child.
- \* Check one or both (for example, if one parent was advised and the other cannot be located):
- \*  I have advised the parent(s) or legal custodian(s) of the child of my intent to authorize the rendering of educational or medical services, and have received no objection.
- \*  I am unable to contact the parent(s) or legal custodian(s) of the child at this time, to notify them of my intended authorization.

**WARNING: Do not sign this form if any of the statements above are incorrect, or you will be committing a crime punishable by a fine, imprisonment, or both.**

I declare under penalty of perjury under the laws of Louisiana that the foregoing is true and correct.

[Affiant's signature]

Sworn to and subscribed before me this \_\_\_ day of \_\_\_\_\_, 20\_\_

[Notary signature]

[Printed name of notary & notary ID#]

**NOTICES:**

1. This declaration does not affect the rights of the child's parent or legal guardian regarding the care, custody, and control of the child, and does not mean that the non-legal custodian has legal custody of the child.
2. A person who relies on this affidavit has no obligation to make any further inquiry or investigation.
3. This affidavit is not valid for more than one year after the date on which it is executed.

**ADDITIONAL INFORMATION:**

**TO NON-LEGAL CUSTODIANS:**

1. If the child stops living with you, you are required to notify anyone to whom you have given this affidavit as well as anyone of whom you have actual knowledge who received the affidavit from a third party.
2. If you do not have the information in item 8 (Louisiana driver's license or identification card), you must provide another form of identification such as your social security card number.

**TO SCHOOL OFFICIALS:**

The school district may require additional reasonable evidence that the non-legal custodian lives at the address provided in Item 4.

**TO HEALTH CARE PROVIDERS AND HEALTH CARE SERVICE PLANS:**

1. No person who acts in good faith reliance upon a non-legal custodian's affidavit to render educational or medical services, without actual knowledge of facts contrary to those stated in the affidavit, is subject to criminal prosecution or civil liability to any person, or subject to any professional disciplinary action, for such reliance if the applicable portions of the form are completed.
2. This affidavit does not confer dependency for health care coverage purposes.

*(Continued from page 4)*

lack the substance of a disclaimer placed in the body of the instrument as far as being binding on the parties and their successors if you're called on to defend your lack of involvement in the preparation of the document.

It would be much better for you to have the parties insert a disclaimer inside the document before it is executed—one that declares that the parties prepared the instrument to be executed before a notary public and two witnesses, and the parties hold the notary harmless for any legal flaws or invalid provisions it may contain. Be sure the statement is in the document above the signature lines, and that it is placed there before the document is executed. Alternatively, you could receive an affidavit from the parties to the same effect, describing the document. The former option is obviously the best because it is contained in the act. The latter at least gives you some documentation other than your own stamped declaration that you were hired only to pass the act, not to draft it.

### **Signing in reciprocal parishes**

**Question:** If I, an Avoyelles-commissioned notary, am in Rapides or Grant parish and have a document to notarize, do I still state in writing that I am a notary for Avoyelles, or do I state that I am a notary for Rapides (or) Grant and then use my "Avoyelles Notary" Seal?

**Answer:** In a reciprocal parish, you might recite "commissioned in Avoyelles Parish, qualified in Rapides parish" or just "duly qualified in the parish and state aforesaid."

The thing to avoid is a statement that you are "commissioned in and for the state and parish aforesaid" if you're in Rapides. That would be an incorrect statement.

Your office is "notary public in and for the parish of Avoyelles," and your seal is your seal. Use it wherever you are authorized, identifying in the caption, or introduction, the place where you are actually executing the act. For example:

State of Louisiana  
Parish of Rapides

Before me, the undersigned duly commissioned notary public, [commissioned in Avoyelles and] qualified for the Parish of Rapides, came and appeared . . .

But it might just be better to leave all the parish names out, except in the caption:

State of Louisiana  
Parish of Rapides

Before me the undersigned notary public, duly commissioned and qualified, came and appeared . . .

In any case, even though it's bad form, it does not invalidate the document to declare the wrong parish of commission as long as the you are in fact authorized to exercise notarial functions in the parish where you're located.

### **Witness acknowledgments**

**Question:** I have a customer who is an accountant. When her clients can't appear before me to have their signatures notarized, can I have two people subscribe as witnesses and then have one of those people acknowledge the client's signature even if the document does not call for witnesses? Many of her documents may not have room for subscribing witness signatures. What can I do in that instance?

**Answer:** The answer to your question is, "It depends on the nature of the instrument."

Look at notarial instruments as one of two types:

(1) Sworn statements (affidavits): Writings

where the person making the statement is placed under oath and makes their statement to the official under penalty of perjury.

An affidavit, then, by definition, cannot be made by witness acknowledgment because a witness cannot place the person under oath. As a notarial instrument, an affidavit is a statement sworn before a notary.

(2) Juridical acts. Private acts and acts that are not required to be in authentic form may be *acknowledged*. A party can acknowledge a private act that was not signed in the presence of subscribing witnesses if he signs an acknowledgement in the presence of a notary and two witnesses.

A private act that was signed in the presence of subscribing witnesses can be acknowledged by the affidavit of the parties or by the affidavit of one of the witnesses.

In summary, if the instrument is an affidavit, witnesses cannot acknowledge it. If it is a private act signed in the presence of subscribing witnesses, a witness may later appear before a notary and acknowledge the instrument.

***Caveat Notarius:*** “. . . an act under private signature, though acknowledged, cannot substitute for an authentic act when the law prescribes such an act.” C.C. art. 1836.

## STATE AGENCY UPDATES

### Secretary of State

Barely a week after Katrina devastated our southeastern parishes, Secretary of State Al Ater requested that the governor provide through executive order that notaries in directly affected parishes could temporarily exercise the functions in another parish where they had a temporary residence without additional bond or exam requirements, and to authorize suspension of the late fees for late-filed annual reports.

The executive order was issued as requested. Then, after Rita mangled southwestern Louisiana, the order was expanded to include the additional parishes.

Under the most recent order, KBB 2005-56 (10/26/05), notaries commissioned in Allen, Beauregard, Calcasieu, Cameron,

Jefferson, Jefferson Davis, Orleans, Plaquemines, St. Bernard, St. Tammany, Vermillion, and Washington may exercise the functions of a notary public within the parish of their temporary residence without additional bonding requirements — provided such notary registers his or her temporary address with the notary division of the secretary of state's office.

***Caveat Notarius:*** The order does not go as far as permitting a notary to exercise the functions of a notary in any other parishes reciprocal to that of their temporary residence. The most recent extension (KBB 2005-89) keeps these executive orders in effect until February 28, 2006.

*Have a wonderful new year*



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Published three times a year  
Spring, Summer, and Fall by  
The Golden Bough LLC

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