

KRISTEN ELMER AND LAUREN ELMER

NO. 23-CA-251

VERSUS

FIFTH CIRCUIT

DEBORAH JOHNSON POYNOR

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT  
PARISH OF JEFFERSON, STATE OF LOUISIANA  
NO. 827-221, DIVISION "E"  
HONORABLE FRANK A. BRINDISI, JUDGE PRESIDING

May 15, 2024

**JOHN J. MOLAISON, JR.**  
**JUDGE**

Panel composed of Judges Jude G. Gravois,  
John J. Molaison, Jr., and Timothy S. Marcel

**AFFIRMED**

**JJM**

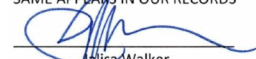
**JGG**

**TSM**

**CONCURS WITH REASONS**

**JJM**

FIFTH CIRCUIT COURT OF APPEAL  
A TRUE COPY OF DOCUMENTS AS  
SAME APPEARS IN OUR RECORDS

  
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## **MOLAISON, J.**

Appellants Kristen and Lauren Elmer seek review of the trial court's denial of their motion for summary judgment related to the interpretation and applicability of Louisiana Trust Code statutes. For the reasons that follow, we affirm the trial court's judgment.

### **FACTS AND PROCEDURAL HISTORY:**

The underlying facts of this matter are not at issue. On June 30, 2017, Jeanne Watson ("the Settlor") created the Watson Family Irrevocable Trust (the "Trust"). The trust named Ms. Watson the income beneficiary for the remainder of her lifetime. Ms. Watson's daughters are Deborah Poynor and Karen Elmer. They were both designated as initial principal beneficiaries, entitled to the remainder of the principal in the trust upon Ms. Watson's death. One term of the Trust was that Ms. Watson reserved "the right to modify ownership interest in principal, including the right to eliminate entirely the principal interest of a principal beneficiary."

The Trust consisted of two categories: 1) assets related to a condominium in Wisconsin and 2) all other property owned by Ms. Watson. For the condominium assets, the Trust provided that if Ms. Poynor or Ms. Elmer pre-deceased Ms. Watson and had children at the time of death, then that principal beneficiary's interest would pass to those children (Ms. Watson's grandchildren.) However, if Ms. Poynor or Ms. Elmer pre-deceased Ms. Watson and did not have children of their own at the time of death, then the interest in the condominium would pass to the other principal beneficiary.<sup>1</sup> As to all other assets, the trust provided that "if a principal beneficiary predeceases a Settlor, the principal beneficiary's interest shall vest in the surviving principal beneficiary, or if there is no surviving principal beneficiary, in the surviving descendants of Settlor."

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<sup>1</sup> See, Section 1.3 of the Trust formation document.

Ms. Elmer died before Ms. Watson in 2020; Ms. Watson passed away later that same year. Appellants Kristen and Lauren Elmer are Ms. Elmer's daughters and survived her. Upon the death of Ms. Watson, the appellants received Ms. Elmer's interest in the condominium assets contained in the Trust. On April 18, 2022, the appellants filed a Petition For Declaratory Judgment at the Twenty-Fourth Judicial District Court, which named Ms. Poynor as a defendant. The petition alleged that the portion of the trust that gave Ms. Poynor full ownership of all remaining non-condominium assets after the deaths of Ms. Elmer and Ms. Watson is invalid under La. R.S. 9:1973(A) of the Louisiana Trust Code. The petition further sought to compel Ms. Poynor to fully account for trust assets to the appellants.

On October 14, 2022, Ms. Poynor and the appellants filed cross-motions for summary judgment on the issues of whether the trust impermissibly transferred the non-condominium assets to Ms. Poynor and whether Ms. Poynor had a duty to provide an accounting to the appellants.<sup>2</sup> The court heard the motions for summary judgment on December 9, 2022. On January 4, 2023, the trial court rendered a written judgment that denied the appellants' motion and granted Ms. Poynor's motion for summary judgment. This timely appeal followed.

### **ASSIGNMENTS OF ERROR**

The appellants claim in their first assignment that the trial court erred in finding it permissible for the trust to transfer Ms. Elmer's principal beneficiary interest in the non-condominium assets to Ms. Poynor. In their second assignment of error, the appellants argue that the court did not require Ms. Poynor to provide them with a complete accounting of the Trust.

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<sup>2</sup> In conjunction with the motions for summary judgment, all parties stipulated to the facts of the case, which have been recounted above.

## **LAW AND ANALYSIS**

We first consider the issue of whether, as a matter of law, it is permissible under La. R.S. 9:1973(A) of the Louisiana Trust Code, for Ms. Watson to have provided in the trust to transfer Ms. Elmer's interest in the Trust's non-condominium assets to Ms. Poynor.

### ***Standard of review***

A party may seek a declaration on a legal issue through the summary judgment procedure. *Cypress Heights Acad. v. CHA Invs., LLC*, 21-0820 (La. App. 1 Cir. 6/7/22), 343 So.3d 736, 742, *reh'g denied* (July 20, 2022), *writ denied*, 22-01284 (La. 11/8/22), 349 So.3d 574, and *writ denied sub nom. Cypress Heights Acad., Inc. v. CHA Invs., LLC*, 22-01247 (La. 11/8/22), 349 So.3d 576. In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is proper. *M/V Resources LLC v. Louisiana Hardwood Products LLC*, 16-0758 (La. App. 1st Cir. 7/26/17), 225 So.3d 1104, 1109, *writ denied*, 17-1748 (La. 12/5/17), 231 So.3d 624.

### ***Relevant provisions of the Watson Family Irrevocable Trust***

The relevant provisions of the trust document state:

1.2 **Income Beneficiaries.** The lifetime income beneficiary of this Trust shall be Jeanne K. Watson. ...

1.3 **Principal Beneficiaries.** The successor income beneficiaries and initial principal beneficiaries shall be Karen J. Elmer and Deborah Johnson Poyner, in equal portions.

...

As to the portion of the Trust principal comprised of [the condo], if a principal beneficiary who is survived by a child or children predeceases the Settlor, the principal beneficiary's interest shall vest in the children of the principal beneficiary. If a principal beneficiary who is not survived by a child or children predeceases a Settlor, the principal beneficiary's interest shall vest in the surviving beneficiary.

As to the remainder of the Trust principal, if a principal beneficiary predeceases a Settlor, the principal beneficiary's interest shall vest in

the surviving principal beneficiary, or if there is no surviving principal beneficiary, in the surviving descendants of Settlor.

Notwithstanding the provisions set forth in Section 3.1, in accordance with La. R.S. 9:2021, the Settlor may not revoke the trust but reserves the right to modify ownership interest in principal, including the right to eliminate entirely the principal interest of a principal beneficiary, but under no circumstances may a Settlor or a Settlor's spouse be a principal beneficiary.

...

4.2 Death of Principal Beneficiary. If any principal beneficiary hereof should die without descendants after Settlor, but before the termination date provided herein, then to the maximum extent permitted under La. Rev. Stat. R.S. [sic] 9:1973 et seq., as now written or hereafter amended, that beneficiary's interest shall vest pro rata in the surviving principal beneficiaries, or in their children if they are also deceased, and the Trust as to their interests shall continue as to such substitute principal beneficiaries, and shall terminate in accordance with the termination provision set forth in Section 4.1, above.

...

6.5 Accounting. The Settlor specifically waives any requirement that the Trustee render an accounting to a beneficiary, legal representative, or any other person for the Trustee's administration of the Trust.

At the heart of the parties' dispute is the clause in Section 1.3 of the Trust that purports to shift the non-condo interest in the trust principal to a surviving principal beneficiary in case of a principal beneficiary's death. Plaintiffs argue that this clause contains a prohibited substitution not permitted under Louisiana law. For reasons set forth below, we conclude that this clause is valid and enforceable as written.

### ***Discussion***

The dispute in this case presents a purely legal question of whether the clause in Section 1.3 of the trust contains a prohibited substitution and is, therefore, null and void or provides a substitution permissible under Louisiana law. The resolution of the legal question requires an examination of the relevant provisions of the Trust Code and the Civil Code to answer two questions: (1) does the Watson

Trust instrument contain a substitution, and (2) if so, is that substitution permitted or prohibited under Louisiana law?

Prohibited substitutions have long been anathema in Louisiana.<sup>3</sup> As articulated by the Louisiana Supreme Court more than a hundred years ago:

The prohibited substitution is an attempt on the part of a donor or testator to vest title in his donee or legatee without the right of alienation or testamentary disposition or the capacity to transmit it to his heirs. The objection to the substitution is that, during the lifetime of the donee or legatee, neither he nor the person designated to acquire the title at the death of the donee or legatee could alienate the property; and the law prohibits keeping property out of commerce indefinitely and complicating the simple tenures by which alone its ownership is permitted.

*Succession of Reilly*, 136 La. 347; 67 So. 27 (1914)

The Civil Code still forbids prohibited substitutions. La. C.C. art. 1520 states that a disposition by which a thing is donated in full ownership to a first donee, called the institute, with a charge to preserve the thing and deliver it to a second donee, called the substitute, at the death of the institute, is null concerning both the institute and the substitute.<sup>4</sup> This rule, which has been part of the Civil Code since its inception, impeded the development of trusts in Louisiana until the adoption of the Louisiana Trust Code in 1964. At that time, amendments to Article 1520 allowed some substitutions in trust that would otherwise be prohibited.<sup>5</sup>

The Trust Code, La. R.S. 9:1721 - 2252, expressly provides for dispositions that are otherwise prohibited. La. R.S. 9:1723 states that a disposition authorized by the Trust Code may be made in trust, although it would contain a prohibited substitution if made free of a trust. Additionally, La. R.S. 9:1737 states that a settlor may dispose of the property in trust to the same extent that he may dispose

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<sup>3</sup> See *Cloutier v. Lecomte*, 3 Mart. (o.s.) 481 (1814).

<sup>4</sup> Prohibited substitutions are disfavored because they diminish the beneficiary's power of testation and are contrary to the general laws of succession favoring descendant heirs. See Edward F. Martin, Louisiana's Law of Trusts 25 Years After Adoption of the Trust Code, 50 La. L. Rev. 501, 515 (1990).

<sup>5</sup> See generally § 1:4. Trusts and prohibited substitutions; Trust Code provisions on substitutions, 11 La. Civ. L. Treatise, Trusts § 1:4 (3d ed.)

of that property free of trust and to any other extent authorized by the Code and that a trust containing a substitution authorized by the Code is valid.

With this understanding, we turn our attention to Section 1.3 of the trust instrument, which, after naming Karen J. Elmer and Deborah Johnson Poynor as principal beneficiaries, states:

As to the remainder of the Trust principal, if a principal beneficiary predeceases a Settlor, the principal beneficiary's interest shall vest in the surviving principal beneficiary, or if there is no surviving principal beneficiary, in the surviving descendants of Settlor.

On its face, this provision contains a substitution. Ms. Watson gives property in trust to her daughters, Karen and Deborah, but then dictates what happens to that property at the beneficiary's death rather than allow the beneficiary themselves to determine to whom the property should go when they die.

Plaintiffs argue that this substitution is expressly prohibited by the language of La. R.S. 9:1973, which states:

A. (1) Except as to the legitime in trust, the trust instrument may<sup>6</sup> provide that the interest of an original or a substitute principal beneficiary of an irrevocable trust vests in one or more of his descendants upon the death of the beneficiary either during the term of the trust or at its termination. The trust instrument may provide that the interest vests in another person if the beneficiary dies without descendants.

(2) With respect to the legitime in trust, the trust instrument may provide that the interest of an original or a substitute principal beneficiary vests in another person upon the death of the beneficiary either during the term of the trust or at its termination, only if a beneficiary dies intestate and without descendants.

B. The trust instrument may provide that the interest of a designated principal beneficiary of a revocable trust shifts to another person, if the substitution occurs no later than the date when the trust becomes irrevocable.

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<sup>6</sup> The parties have pointed out the use of “may” here is permissive, rather than the mandatory “shall.” The use of the permissive “may” throughout the Trust Code can be understood in light of La. R.S. 9:1723 and 1737, *supra*, which clarify that the Trust Code allows for certain dispositions that would otherwise be prohibited under the Civil Code. If the requirements of La. R.S. 9:1973 need only be met if the disposition would otherwise be prohibited.



Under the plaintiffs' argument, because Karen died testate and with descendants (also her sole heirs), the clause in Section 1.3 purporting to shift Karen's principal beneficiary interest to Deborah at Karen's death is null and void because of the language of La. R.S. 9:1973(A)(1) only allows for such shifts in interest if the principal beneficiary dies without descendants, which is not the case here.

The plaintiffs' interpretation of this provision of the Trust Code appears to be supported by the First Circuit case of *Baxter v. Roth*, 19-0113 (La. App. 1 Cir. 6/24/20), 307 So.3d 1047. In *Baxter*, a dispute arose between the surviving spouse and a testamentary legatee of a family trust beneficiary who predeceased his sibling beneficiaries. Reading La. R.S. 9:1973 *in pari materia* with La. R.S. 9:1972, the First Circuit determined that the decedent's interest be paid to his surviving spouse because he died testate and with descendants. *Id.* at 1051. The Court held that, under La. R.S. 9:1973(A), any substitution provided by the family trust instrument was necessarily predicated in every instance on the requirement that the original or substitute principal beneficiary dies intestate and without descendants. *Id.* at 1053.

While the disposition in *Baxter* is clear and well-reasoned, it is nevertheless distinguishable from the case *sub judice*. In *Baxter*, the parents, who were settlors of the family trust, predeceased all their children, who were the principal beneficiaries. In contrast, in the case before us, the settlor, Ms. Watson, created an *inter vivos* trust with a clause for shifting principal interests that would only be operative while she remained alive.

Under the Watson Trust, the settlor, Ms. Watson, remained the trust's income beneficiary during her lifetime. Ms. Watson was the income beneficiary of the Watson Trust when Karen's principal beneficiary interest shifted to Deborah. As such, the Watson Trust did not provide for a donation of "full ownership" of the

property to the principal beneficiaries as is required to meet the definition of a prohibited substitution in La. C.C. 1520.<sup>7</sup>

As noted above, La. R.S. 9:1737 provides that property may be donated in trust to the same extent she may dispose of property free of trust. Ms. Watson's *inter vivos* donation conditioned upon the beneficiary surviving her is permissible, not a prohibited substitution, and therefore, the requirements of La. R.S. 9:1973 need not be satisfied. Accordingly, we find that the provision of Section 1.3 of the trust instrument is valid and enforceable as written.

The appellants also assert that the trial court erred in not ordering Ms. Poynor to provide an accounting of all Trust assets. However, as the record does not show that the trial court ruled on a Trust-related accounting issue, there is nothing for this Court to review.

### **DECREE**

For the preceding reasons, we affirm the judgment of the trial court.

**AFFIRMED**

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<sup>7</sup> See also La. C.C. art. 1522, (“A disposition *inter vivos* ... by which the usufruct is given to one person and the naked ownership to another is not a prohibited substitution.”)

KRISTEN ELMER AND LAUREN  
ELMER

VERSUS

DEBORAH JOHNSON POYNOR

NO. 23-CA-251

FIFTH CIRCUIT

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STATE OF LOUISIANA

**MOLAISON J., CONCURS WITH ADDITIONAL REASONS**

I write separately to address the issue of the settlor’s intent, which the parties argued below and central to the trial court’s determination of this matter.

In this case, the settlor declared in writing that she wished to avail herself of the provisions of the Louisiana Trust Code. In Section 1.3 of the document creating the trust, the Settlor stated in the relevant part, “[n]otwithstanding the provisions set forth in Section 3.1, in accordance with La. R.S. 9:2021, the Settlor may not revoke the trust but **reserves the right to modify ownership interest in principal, including the right to eliminate entirely the principal interest of a principal beneficiary...**” [Emphasis added.] Section 3.1 provides:

The Trust shall be absolutely irrevocable and Settlor shall have no right to alter, amend, or terminate the Trust created by this Act. This trust cannot be modified or terminated by a court.

Concerning the issue of accounting, Section 6.5 of the Trust document states:

The Settlor specifically waives any requirement that the Trustee render an accounting to a beneficiary, legal representative, or any other person for the Trustee's administration of the Trust.

***Applicable Trust Code provisions***

As the appellants and the appellee acknowledged, laws in effect at the time of the trust’s creation govern the trust.<sup>8</sup> In the instant case, the creation of the trust occurred in 2017. At that time, La. R.S. 9:1972 provided:

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<sup>8</sup> La. R.S. 9:2252 states:

Upon a principal beneficiary's death, his interest vests in his heirs or legatees, subject to the trust. Nevertheless, the trust instrument may provide otherwise by designating substitute principal beneficiaries to the extent permitted by the following Sections of this Subpart and R.S. 9:1895.

La. R.S. 9:1973 provided, in relevant parts:

A. (1) Except as to the legitime in trust, the trust instrument may provide that the interest of an original or a substitute principal beneficiary of an irrevocable trust vests in one or more of his descendants upon the death of the beneficiary either during the term of the trust or at its termination. The trust instrument may provide that the interest vests in another person if the beneficiary dies without descendants.

. . .

B. The trust instrument may provide that the interest of a designated principal beneficiary of a revocable trust shifts to another person, if the substitution occurs no later than the date when the trust becomes irrevocable.

### ***Interpretation of the Trust document***

Relative to the Louisiana Trust Code, La. R.S. 9:1724, states:

The provisions of this Code shall be accorded a liberal construction in favor of freedom of disposition. Whenever this Code is silent, resort shall be had to the Civil Code or other laws, but neither the Civil Code nor any other law shall be invoked to defeat a disposition sanctioned expressly or impliedly by this Code.

Inherent within the trust law is the concept of trust indestructibility and the protection of the trust instrument from any modification or termination contrary to the settlor's clearly expressed intent. *Succession of Lanier*, 17-540 (La. App. 3 Cir. 5/30/18), 249 So.3d 1059, 1062–63, writ denied, 2018-1091 (La. 10/15/18), 253 So.3d 1304, citing *Succession of Gourgis*, 08-430 (La. App. 5 Cir. 11/12/08), 1 So.3d 528, 532, writ denied sub nom. *In re Gourgis*, 08-2902 (La. 2/13/09), 999 So.2d 1147. A strong public policy is needed to effectuate and protect the settlor's

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Trusts heretofore created and any provisions or dispositions therein made shall be governed by the laws in effect at the time of their creation. Unless otherwise provided in the trust instrument, trusts created prior to the effective date of this Code shall be governed in all administrative and procedural matters by the provisions of this Code and not by laws in effect at the time of creation of such trusts, and trusts created prior to the adoption of any amendment to this Code shall be governed in administrative and procedural matters by the provisions of the amendment.

intent as outlined in the trust instrument. *Albritton v. Albritton*, 91-2903 (La. 5/26/92), 600 So.2d 1328. The settlor's intent controls, unless opposed to law or public policy. *Richards v. Richards*, 408 So.2d 1209 (La. 1981). A trust instrument shall be given an interpretation that will sustain the effectiveness of its provisions if the trust instrument is susceptible to such an interpretation. *Marlies Margot Cernicek Irrevocable Living Tr. v. Becnel*, 22-62 (La. App. 5 Cir. 11/16/22), 353 So.3d 950, 954, citing *Grant v. Grant*, 35,635 (La. App. 2 Cir. 2/27/02), 810 So.2d 1226, 1228.

*Inter vivos* trusts, such as the one at issue, are created upon executing the trust instrument. La. R.S. 9:1822. Generally, a settlor may modify the terms of the trust after its creation only to the extent he expressly reserves the right to do so. La. R.S. 9:2021. Here, the Settlor made clear that while the entirety of the Trust was irrevocable, she reserved the right to modify ownership interest in principal, including how the trust assets were distributed should a principal beneficiary of the Trust predecease her. Notably, the reservation in Section 1.3 of the Trust document did not apply to all assets in the Trust. Ms. Elmer's heirs, the appellants, did receive their mother's interest in the condominium.

In *Hilliard v. Marshall*, 91 F. Supp. 2d 916, 920 (W.D. La. 1999), the court considered the validity of an *inter vivos* trust with similar provisions as the one at issue. In that case, the settlor created a living trust that named him the income and principal beneficiary for his lifetime. While the trust was designated as "irrevocable," the Settlor expressly reserved the power to substitute beneficiaries "for the beneficiary of any interest established in this instrument." After the settlor's death, a creditor sought to have the trust invalidated for, among other reasons, that "[t]he Trust reserves the settlor's right to substitute beneficiaries." In finding this argument of the creditor to be without merit, the court observed:

Louisiana Revised Statutes 9:2021 expressly allows a settlor to reserve the right to modify the trust document. Mr. Marshall exercised this right by reducing E. Pierce Marshall's interest and substituting the Marshall Museum for a portion of his interest.

*Id.*

Similarly, in the instant case, the Settlor created a Trust that contains an “irrevocable” provision. However, the revocability of the Trust is not an issue insofar as the Settlor never attempted to revoke the trust in its entirety during her lifetime. Yet, the Settlor also reserved the right of substitution, which is the hallmark of a revocable *inter vivos* trust. The record indicates that in granting summary judgment in favor of Ms. Poynor, the trial court reasoned:

THE COURT:

I'm denying the plaintiff's motion for summary judgment and I'm granting the motion for summary judgment filed by the defendant, Deborah Johnson Poynor. And I base my decision on the intent of the settlor, Ms. Jean Watson. I do agree with Mr. Marx, I think her intent is crystal clear in the documents. I don't believe that this is a prohibitive substitution and I'm basing my decision on the succession of *Bradley* case and the trust code.

The trial court's ruling is consistent with the jurisprudence stated above, which makes the intent of a settlor paramount in trust interpretation issues.

The Settlor's reservation of rights to substitute a principal beneficiary is allowable under Louisiana trust law. *See* La. R.S. 9:1973(A)(1) (“Except as to the legitime in trust, the trust instrument may provide that the interest of an original or a substitute principal beneficiary of an irrevocable trust vests in one or more of his descendants upon the death of the beneficiary either during the term of the trust or at its termination.”) The reservation in the instant case was made at the inception of the Trust, and the substitution took place before the Settlor's death. While the Trust was also made “irrevocable,” the Settlor never attempted to revoke the Trust during her lifetime. Thus, whether the Trust is irrevocable is only relevant insofar

as the appellants seek to apply one condition of the Trust to defeat what is otherwise an allowable substitution of principal beneficiaries.

After a *de novo* review of the record, I agree with the trial court that the Settlor's intent concerning the non-condominium assets in the Trust is clear. Under the specific facts of this case and the applicable law, the Settlor's reservation of rights is not inconsistent with the provision making the Trust "irrevocable." Accordingly, I find the appellants' first assignment of error to be without merit.

***Conclusion***

In addition to the reasons previously assigned, I would affirm the trial court's judgment based on evidence of the Settlor's intent.

SUSAN M. CHEHARDY  
CHIEF JUDGE

FREDERICKA H. WICKER  
JUDE G. GRAVOIS  
MARC E. JOHNSON  
STEPHEN J. WINDHORST  
JOHN J. MOLAISSON, JR.  
SCOTT U. SCHLEGEL  
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JUDGES



FIFTH CIRCUIT

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**NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY**

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **MAY 15, 2024** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

**CURTIS B. PURSELL**  
CLERK OF COURT

**23-CA-251**

**E-NOTIFIED**

24TH JUDICIAL DISTRICT COURT (CLERK)

HONORABLE FRANK A. BRINDISI (DISTRICT JUDGE)

MICHAEL A. MAHONE, JR. (APPELLANT)

STEPHEN D. MARX (APPELLEE)

**MAILED**

NO ATTORNEYS WERE MAILED