

Regular Session, 2014

HOUSE BILL NO. 1133

BY REPRESENTATIVE TIM BURNS

(On Recommendation of the Louisiana State Law Institute)

CIVIL/MANDATE: Provides with respect to review of the actions of a mandatary

1 AN ACT

2 To enact Chapter 2-A of Code Title XV of Code Book III of Title 9 of the Louisiana
3 Revised Statutes of 1950, to be comprised of R.S. 9:3851 through 3856, and to
4 amend and reenact Civil Code Article 3029 and R.S. 6:311.1 and
5 333(B)(introductory paragraph), relative to powers of attorney for the elderly; to
6 provide for the filing of an action to review the acts of a mandatary; to provide for
7 contents of the petition, service, and venue; to provide for the motion to dismiss; to
8 provide for the substitution of parties; to provide for the relief the court may grant
9 and the actions the court may take; to provide for the acts of the mandatary that
10 constitute irreparable injury; to provide for payment of costs and attorney fees; to
11 provide for exclusions and the applicability of the action; to provide for termination
12 of the mandate; to provide for written notice to federally insured financial
13 institutions; to provide for termination or modification; to provide for a bank's
14 disclosure of certain records; and to provide for related matters.

15 Be it enacted by the Legislature of Louisiana:

16 Section 1. Chapter 2-A of Code Title XV of Code Book III of Title 9 of the
17 Louisiana Revised Statutes of 1950, comprised of R.S. 9:3851 through 3856, is hereby
18 enacted to read as follows:

CHAPTER 2-A. ACTION TO REVIEW THE ACTS OF A MANDATARY

§3851. Who may file; petition contents; service; venue

A. When a principal is a natural person for whom a curator with appropriate authority has not qualified, any of the following persons may petition a court on behalf of the principal to review the acts of the principal's mandatory and to grant relief authorized by this Chapter:

(1) A person authorized to make healthcare decisions for the principal.

(2) A spouse, a parent, or a descendant of the principal.

(3) A presumptive heir or legatee of the principal.

(4) A person named as a beneficiary to receive any real or personal right upon the death of the principal.

(5) A trustee or beneficiary of an inter vivos or testamentary trust created by or for the principal.

(6) A caregiver of the principal.

(7) Any other person with sufficient interest in the welfare of the principal.

B. The petition shall be verified and shall name as defendants the principal, the mandatory, and any other person against whom relief is sought. The petition shall state with particularity the facts establishing the petitioner's right to bring the action, the reasons that a review of the acts of the mandatory is needed, and the relief sought.

C. The principal shall be personally served with the citation and petition. Service on the principal through a mandatory shall not be effective.

D. The action shall be filed in the parish where the principal is domiciled, where the principal resides if without a domicile in this state, or where the principal is physically present or where immovable property of the principal is located if the principal is without either a domicile or a residence in this state.

Comments - 2014

(a) Because a mandate is generally durable under Louisiana law, it is likely that a mandatory will continue to act for a principal after the principal is no longer able to monitor the performance of the mandatory. This Chapter creates a new right of action to allow persons other than the principal to initiate an action against a

1 mandatory. This right of action is not available when the principal is not a natural
2 person, or when a curator has qualified, as other law governs those claims. This
3 Chapter has no impact on the authority that a principal has under any other law to
4 control the actions of a mandatory, to terminate a mandate, or to recover property or
5 damages from a mandatory; it merely authorizes additional parties to bring those
6 claims on the principal's behalf.

7 (b) Civil Code Articles 880 - 901 govern who is a presumptive heir.

8 (c) Governmental agencies are omitted from the list of those who may file
9 an action under this Chapter because they have authority to bring actions under other
10 laws. See, for example, R.S. 14:67.21 (Theft of the assets of an aged person or
11 disabled person), R.S. 14:93.3, (Cruelty to the infirmed), R.S. 14:93.4 (Exploitation
12 of the infirmed), R.S. 15:1501-1511 (Adult Protective Services Act) and R.S.
13 46:437.1 et seq. (Medical Assistance Programs Integrity Law).

14 (d) As Civil Code Article 2988 generally applies the rules of mandate to
15 procurations, an action under this Chapter may be brought against a representative
16 with respect to a procuration. See R.S. 9:3856.

17 (e) The principal must be named as a defendant and must be personally
18 served with the petition and citation to ensure the principal has actual notice of the
19 action. The petition may also name a person other than the mandatory and the
20 principal as a defendant.

21 (f) The petition must include a detailed explanation of the objectionable acts
22 and the reasons for the objection.

23 (g) This Chapter imposes a heightened pleading standard and requires a
24 verified petition to discourage plaintiffs from filing frivolous suits. As an additional
25 disincentive to frivolous suits, the prevailing party may be awarded costs and
26 attorney fees under R.S. 9:3855.

27 (h) Subsection D addresses venue only and is not intended to create personal
28 jurisdiction over any defendant.

29 (i) An action under this Chapter shall be by ordinary process, but the use of
30 summary proceedings is available to address incidental questions arising in the
31 course of the action. See C.C.P. Art. 2592(1).

32 (j) R.S. 9:3854(D) permits a court to order injunctive relief without a
33 showing of irreparable injury.

34 §3852. Dismissal upon motion to dismiss filed by the principal

35 A. If the principal files a motion to dismiss the action, the principal shall
36 testify in person at the hearing on the motion or, with the agreement of the parties or
37 for good cause shown, by visual remote technology or by deposition.

38 B. The court shall grant the principal's motion to dismiss the action if it finds
39 that the principal is able to comprehend generally the nature and consequences of the
40 acts of the mandatory and that the mandatory's authority to act is not the result of
41 fraud, duress, or undue influence.

1 Comments-2014

2 (a) A principal may choose to file a motion to dismiss the action. Before
3 ruling on the principal's motion to dismiss, the court must hold a hearing to
4 determine whether the principal is aware of the acts of the mandatary and not subject
5 to fraud, duress, or undue influence, is able to comprehend generally the nature and
6 consequences of the acts of the mandatary, and appears able to make reasoned
7 decisions.

8 (b) When a principal is aware of the acts of the mandatary, and is not subject
9 to fraud, duress, or undue influence, and is able to comprehend generally the nature
10 and consequences of the acts of the mandatary, the court must grant the principal's
11 motion to dismiss.

12 (c) The principal must be present in person at the hearing to allow the court
13 to make the determinations described in this Section. The parties may agree to, or
14 the court may order, remote testimony. The standard for permitting a principal to be
15 absent from the proceeding, for good cause shown, is a lower standard than is
16 required by Code of Civil Procedure Article 1633.1, which allows testimony by
17 visual remote technology under compelling circumstances. This lower standard
18 allows greater use of remote testimony in an appropriate case.

19 §3853. Substitution

20 Upon the interdiction or death of the principal, the court shall allow a curator
21 with appropriate authority or the principal's legal successor to be substituted for the
22 plaintiff.

23 Comments - 2014

24 (a) The principal's death terminates the mandate. This Section permits the
25 principal's legal successor to be substituted for the petitioner in an action under this
26 Chapter. The legal successor may then elect to continue or to dismiss the action.
27 Conflicts of interest may arise when the succession representative is also the
28 defendant in the action. Under other laws, presumptive heirs and legatees may
29 challenge the appointment of a succession representative they deem to be unfit or
30 may bring an action against a succession representative.

31 (b) Full interdiction also terminates the mandate. A court may terminate a
32 mandate in a limited interdiction by placing the property subject to the mandate
33 under the authority of a curator. A curator, once qualified, can be substituted for the
34 petitioner and may then elect to continue or to dismiss the suit. Temporary or
35 preliminary interdictions have no effect on the action; it remains available during a
36 temporary or preliminary interdiction.

37 (c) Allowing substitution avoids res judicata issues. The existing action
38 continues with the new parties. Where prescription was interrupted by the
39 commencement of an action under this Chapter, that interruption continues.

40 §3854. Relief

41 A. If the court finds that a mandatary has violated a duty or failed to perform
42 any obligation as a mandatary, the court may:

43 (1) Grant any relief to which the principal is entitled.

1 (2) Enjoin the mandatary from exercising all or some of the powers granted
2 by the mandate.

3 B. While the action is pending, the court may do any of the following:

4 (1) Order an accounting from the mandatary.

5 (2) Order, without first holding a contradictory hearing, a financial
6 institution, a healthcare provider, or any other person to provide the financial,
7 medical, or other information of any defendant to the action.

8 (3) Appoint a qualified person to investigate the allegations of the petition
9 and to report the findings.

10 (4) On its own motion, order other appropriate discovery.

11 (5) Enjoin the mandatary from exercising all or some of the powers granted
12 by the mandate during the pendency of the action.

13 (6) Appoint a person to exercise some or all of the authority granted by the
14 mandate, including authority to perform routine financial transactions and to make
15 healthcare decisions, if there is no successor or substitute mandatary named in the
16 mandate who is able or willing to serve, or if no law otherwise provides a person to
17 act.

18 C. In reaching its decision, the court shall consider the mandate and may
19 consider any other relevant factors, including any of the following:

20 (1) The expressed wishes of the principal.

21 (2) The known or reasonable expectations of the principal.

22 (3) The best interests of the principal.

23 (4) Any will, trust, or beneficiary designation executed by the principal.

24 (5) The principal's history or pattern of donations inter vivos.

25 (6) Physical, financial, or psychological abuse of the principal.

26 (7) Fraud, duress, or undue influence.

27 (8) The principal's regular contact with family and friends other than the
28 mandatary.

1 Comments - 2014

2 (a) Court costs and attorney fees are allowed to discourage frivolous suits or
3 to reimburse the petitioner who initiates an action under this Chapter to benefit the
4 principal.

5 (b) The principal may be responsible for reimbursing the mandatary for
6 expenses incurred in carrying out the mandate, as provided in Civil Code Article
7 3012.

8 §3856. Applicability

9 A. This Chapter applies to a procuration and a representative in the same
10 manner as it applies to a mandate and a mandatary, respectively, and allows an action
11 against a representative for violating any duty or failing to fulfill any obligation in
12 the procuration.

13 B. This Chapter does not apply to a mandate to the extent that the mandate
14 is irrevocable as provided by law.

15 Comments - 2014

16 (a) Civil Code Article 2988 subjects a procuration to the rules governing
17 mandate.

18 (b) This Chapter creates a new right of action to protect the interests of a
19 principal when a mandatary is no longer prudently fulfilling the mandate. This
20 protection may not be appropriate for all mandates. This Section excludes from this
21 protection a mandate made in the interest of the mandatary or a third person when
22 the principal agrees that the mandate is irrevocable and when the law allows the
23 mandate to be irrevocable.

24 (c) Civil Code Article 3025 governs when the parties may agree to make a
25 mandate irrevocable. A common occasion for irrevocability involves creditors who
26 require an irrevocable mandate in case a debtor defaults. The "third party" identified
27 in Civil Code Article 3025 could be a creditor.

28 Section 2. Civil Code Article 3029 is hereby amended and reenacted to read as
29 follows:

30 Art. 3029. Termination by the mandatary

31 The mandate and the authority of the mandatary terminate when ~~he~~ the
32 mandatary notifies the principal of his resignation or renunciation of his authority.

33 When a mandatary has reasonable grounds to believe that the principal lacks
34 capacity, the termination is effective only when the mandatary notifies another
35 mandatary or a designated successor mandatary. In the absence of another
36 mandatary or a designated successor mandatary, the termination is effective when

1 the mandatory notifies a person with a sufficient interest in the welfare of the
 2 principal.

3 Comment - 2014

4 The duty of the mandatory to notify someone other than the principal when
 5 the mandatory believes the principal lacks capacity does not impose a duty on the
 6 person notified to accept any responsibility or to take any action. The mandatory
 7 remains responsible for the consequences of his failure to fulfill the mandate until
 8 proper notice is given.

9 Section 3. R.S. 6:311.1 and 333(B)(introductory paragraph) are hereby amended and
 10 reenacted to read as follows:

11 §311.1. Powers of attorney, procuration, and mandate; written notice of revocation

12 A.(1) Notwithstanding any provision of law to the contrary, any federally
 13 insured financial institution presented with an original or certified true copy of a
 14 power of attorney, procuration, or mandate that is sufficient to authorize the named
 15 agent, representative, or mandatory to transact business in a deposit account, with a
 16 certificate of deposit, or with other funds on deposit, or sufficient to authorize access
 17 to a safe deposit box, may rely on the authority designated in ~~such~~ the power of
 18 attorney, procuration, or mandate as being in full force and effect, unless an officer
 19 of the federally insured financial institution receives written notice that ~~such~~ the
 20 power of attorney, procuration, or mandate has been ~~terminated~~ or revoked,
 21 modified, or terminated, and the institution has had reasonable opportunity to act on
 22 it.

23 (2) ~~Written notice shall be deemed to be received upon receipt by an officer~~
 24 ~~of the federally insured financial institution.~~

25 (3) For the purposes of this Section, "written notice" shall mean a court order
 26 or other writing ~~addressed to the federally insured financial institution~~ indicating that
 27 the ~~principal~~ power of attorney, procuration, or mandate has been revoked, modified,
 28 or terminated, ~~the authority of the agent, or indicating that one of the events of~~
 29 ~~termination as specified in~~ including a termination pursuant to Civil Code Article
 30 3024 ~~has occurred~~.

1 B. A federally insured financial institution shall not be liable for transactions
2 or activity by an agent, representative, or mandatory occurring prior to the receipt of
3 written notice and a reasonable opportunity to act on it.

4 * * *

5 §333. Disclosure of financial records; reimbursement of costs

6 * * *

7 B. Notwithstanding any other provision of law to the contrary, except R.S.
8 9:151 et seq. and 3854(B)(2), R.S. 13:3921 et seq., Code of Civil Procedure Article
9 2411 et seq., R.S. 46:236.1.4, and R.S. 47:1676(D)(2) and 1677, no bank or its
10 affiliate shall disclose any financial records to any person other than the customer to
11 whom the financial records pertain, unless such financial records are disclosed:

12 * * *

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)]

Tim Burns

HB No. 1133

Abstract: Provides protection of the elderly from abuses by a mandatory by authorizing an individual with an interest to request the court to review the acts of the mandatory and to grant appropriate relief.

Proposed law (R.S. 9:3851) authorizes certain individuals with an interest in the principal's welfare to file an action on the principal's behalf requesting the court to review the mandate's acts and grant appropriate relief. It also specifies the required contents of the petition, and service and venue requirements.

Proposed law (R.S. 9:3852) provides that if the principal files a motion to dismiss the action, the principal shall testify in person or in certain cases by remote technology or deposition, and also provides that the court shall grant the motion to dismiss if the principal is able to comprehend generally the nature and consequences of the mandatory's act and is not subject to fraud, duress, or undue influence.

Proposed law (R.S. 9:3853) provides for substitution of the plaintiff by a curator or the principal's legal successor upon the principal's interdiction or death.

Proposed law (R.S. 9:3854) provides that if the court finds that the mandatory has violated a duty, it may grant any relief to which the principal is entitled and may also enjoin a mandatory from exercising some or all of the powers granted under the mandate. It also authorizes the court to take certain actions while the action is pending, including discovery, disclosure of information by financial institutions and healthcare providers, an accounting by a mandatory, temporarily enjoining a mandatory from exercising all or some of the

powers granted by the mandate and appointing someone to temporarily exercise some or all of the powers granted by the mandate.

Proposed law lists certain factors for the court to consider in reaching its decision, including the principal's express wishes, fraud, duress, or undue influence, and the principal's ability to comprehend generally the nature and consequences of the mandatary's acts. It further specifies that a mandatary's unauthorized acts constitute irreparable injury for purposes of injunctive relief.

Proposed law (R.S. 9:3855) provides that the court may award costs and attorney fees against any party but not when the petition is dismissed on the merits.

Proposed law (R.S. 9:3856) provides that proposed law is also applicable to a procuration and representative but is not applicable when the mandate is irrevocable by law.

Present law (C.C. Art. 3029) provides that the mandate and the authority under the mandate terminate upon the mandate's notice of resignation to the principal.

Proposed law retains present law and adds that when the mandatary has reasonable grounds to believe that the mandatary lacks capacity, the termination is effective upon notice to other specified individuals.

Present law (R.S. 6:311.1) provides that a federally insured financial institution may rely on an original or certified copy of a power of attorney that is sufficient to authorize the named agent to transact business unless the institution receives written notice of the power of attorney's revocation.

Present law specifies that written notice is a writing indicating revocation of the power of attorney and that it has been received upon receipt by an institution's officer. It also relieves the institution of liability for transactions occurring prior to the receipt of notice.

Proposed law retains present law, provides for applicability to "procuration" and "mandate", expands "written notice" to include a court order, and expands applicability to notice of modification and termination in addition to revocation.

Present law (R.S. 6:333(B)(intro. para.)) provides for the restrictions on a bank's disclosure of a customer's records and exceptions to those restrictions.

Proposed law retains present law and adds as an additional exception, R.S. 3854(B)(2), that authorizes the court to order disclosure of financial records when it finds that a mandatary violated a duty under a contract of mandate.

(Amends C.C. Art. 3029, R.S. 6:311.1 and 333(B)(intro. para.); Adds R.S. 9:3851-3856)