

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

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AN ACT

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

Be it enacted by the Legislature of Louisiana:

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



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 mandatary, to terminate a mandate, or to recover property or  
5           damages from a mandatary; 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 mandatary 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 mandatary and that the mandatary'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.

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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





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 mandatory's acts. It further specifies that a mandatory'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 mandatory has reasonable grounds to believe that the mandatory 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 mandatory 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)