

Regular Session, 2014

HOUSE BILL NO. 1133

BY REPRESENTATIVE TIM BURNS

(On Recommendation of the Louisiana State Law Institute)

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 mandatar; 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 mandatar 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:

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

20 §3851. Who may file; petition contents; service; venue

21 A. When a principal is a natural person for whom a curator with appropriate
22 authority has not qualified, any of the following persons may petition a court on

1 behalf of the principal to review the acts of the principal's mandatary and to grant
2 relief authorized by this Chapter:

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

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

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

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

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

10 (6) A caregiver of the principal.

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

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

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

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

23 Comments - 2014

24 (a) Because a mandate is generally durable under Louisiana law, it is likely
25 that a mandatary will continue to act for a principal after the principal is no longer
26 able to monitor the performance of the mandatary. This Chapter creates a new right
27 of action to allow persons other than the principal to initiate an action against a
28 mandatary. This right of action is not available when the principal is not a natural
29 person, or when a curator has qualified, as other law governs those claims. This
30 Chapter has no impact on the authority that a principal has under any other law to
31 control the actions of a mandatary, to terminate a mandate, or to recover property or
32 damages from a mandatary; it merely authorizes additional parties to bring those
33 claims on the principal's behalf.

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

1 (c) Governmental agencies are omitted from the list of those who may file
 2 an action under this Chapter because they have authority to bring actions under other
 3 laws. See, for example, R.S. 14:67.21 (Theft of the assets of an aged person or
 4 disabled person), R.S. 14:93.3, (Cruelty to the infirmed), R.S. 14:93.4 (Exploitation
 5 of the infirmed), R.S. 15:1501-1511 (Adult Protective Services Act) and R.S.
 6 46:437.1 et seq. (Medical Assistance Programs Integrity Law).

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

10 (e) The principal must be named as a defendant and must be personally
 11 served with the petition and citation to ensure the principal has actual notice of the
 12 action. The petition may also name a person other than the mandatary and the
 13 principal as a defendant.

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

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

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

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

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

27 §3852. Dismissal upon motion to dismiss filed by the principal

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

31 B. The court shall grant the principal's motion to dismiss the action if it finds
 32 that the principal is able to comprehend generally the nature and consequences of the
 33 acts of the mandatary and that the mandatary's authority to act is not the result of
 34 fraud, duress, or undue influence.

35 Comments-2014

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

1 (b) When a principal is aware of the acts of the mandatory, and is not subject
 2 to fraud, duress, or undue influence, and is able to comprehend generally the nature
 3 and consequences of the acts of the mandatory, the court must grant the principal's
 4 motion to dismiss.

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

12 §3853. Substitution

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

16 Comments - 2014

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

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

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

33 §3854. Relief

34 A. If the court finds that a mandatory has violated a duty or failed to perform
 35 any obligation as a mandatory, the court may:

- 36 (1) Grant any relief to which the principal is entitled.
- 37 (2) Enjoin the mandatory from exercising all or some of the powers granted
 38 by the mandate.

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

- 40 (1) Order an accounting from the mandatory.

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

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

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

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

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

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

16 (1) The expressed wishes of the principal.

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

18 (3) The best interests of the principal.

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

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

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

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

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

25 (9) The ability of the principal to comprehend generally the nature and
 26 consequences of the acts of the mandatary.

27 (10) The donee's knowledge or imputed knowledge that a donation was not
 28 for the benefit or gratification of the principal.

29 (11) The good or bad faith of a defendant.

1 remains responsible for the consequences of his failure to fulfill the mandate until
2 proper notice is given.

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

5 §311.1. Powers of attorney, procuration, and mandate; written notice of revocation

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

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

19 (3) For the purposes of this Section, "written notice" shall mean a court order
20 or other writing addressed to the federally insured financial institution indicating that
21 the principal power of attorney, procuration, or mandate has been revoked, modified,
22 or terminated, the authority of the agent, or indicating that one of the events of
23 ~~termination as specified in~~ including a termination pursuant to Civil Code Article
24 3024 ~~has occurred~~.

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

28 * * *

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

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CODING: Words in ~~struck through~~ type are deletions from existing law; words underscored are additions.

