

HOUSE SUMMARY OF SENATE AMENDMENTS

House Bill No. 94 by Representative McMains

CIVIL/INTERDICTION: Provides relative to interdiction and curatorship (Item No. 106)

Synopsis of Senate Amendments

1. Changes effective date from January 1, 2001 to July 1, 2001.

Digest of Bill as Finally Passed by Senate

This bill is a revision of the Civil Code and Code of Civil Procedure Articles on the subject of interdiction and curatorship.

Civil Code

Article 389: Present law: Full Interdiction is appropriate when the defendant either is "subject to an habitual state of imbecility, insanity or madness" or "owing to any infirmity, (is) incapable of taking care of (his person) and administering (his estate)". Proposed law: Full interdiction is appropriate only when the defendant is functionally unable to care for his person and property and to make or communicate reasoned decision regarding such care.

Article 390: Proposed law retains the present law principle of limited interdiction. It reproduces the principle that a right not specifically restricted in the judgment of limited interdiction is retained by the limited interdict. It retains the principle that the rights of a limited interdict shall be infringed in the least restrictive manner consistent with his incapacities.

Article 391: Proposed law retains the present law principle that a temporary or preliminary interdict is an interdict, a temporary or preliminary curator is a curator, a temporary or preliminary limited interdict is a limited interdict, and a temporary or preliminary limited curator is a limited curator.

Article 392: Proposed law is new and changes the present law. It sets forth in general terms the duties of care and loyalty that the curator owes to the interdict.

Article 393: Proposed law changes the present law. It sets forth generally the undercurator's duties of care and loyalty.

Article 394: Proposed law changes the present law because it does not reproduce the substance of Civil Code Articles 402 and 403 (1870).

Article 395: Proposed law is new and codifies the general rule that interdiction deprives the interdict of the capacity to make juridical acts. In addition, it explicitly acknowledges that specific legislation may override this general lack of legal capacity. Finally, it provides that a judgment of limited interdiction provides the limits on the capacity of a limited interdict.

Article 396: Proposed law retains the present law principle that a judgment of interdiction has effect retroactive to the date of the filing of the petition for interdiction.

Article 397: Proposed law retains the present law principle that a judgment of interdiction terminates by death of the interdict or later judgment. Proposed law changes the present law with regard to the termination date of a judgment of temporary or preliminary interdiction by permitting a court to extend the life of an ex parte judgment of temporary interdiction for one period not exceeding 10 days upon motion of the defendant or for extraordinary reasons shown at a contradictory hearing.

Article 398: Proposed law retains the present law principle that an order modifying or terminating interdiction is effective on the date signed by the court.

Article 399: Proposed law retains the present law principle that there is a cause of action against someone who files an unwarranted petition for interdiction. Proposed law changes the present law in a few respects. It requires that the petitioner either know or should have known that a material factual allegation was false rather than providing that the petitioner acted as a result of motives of interest or passion.

Article 1482: Proposed law retains the present law.

Article 2319: Proposed law changes the present law. Under present law the curator of an insane person is answerable for the damage occasioned by an interdict under his care. Proposed law absolves curators of vicarious liability for the torts of interdicts in their charge.

Code of Civil Procedure

Article 4541: Proposed law changes the present law. First, it sets forth in detail the required elements of an interdiction petition. Second, it requires that every interdiction petition be verified by the petitioner. Proposed law retains substance of present law by providing that any person may petition for interdiction.

Article 4542: Proposed law retains the present law for venue for interdiction proceedings in the parish where the defendant is domiciled; where he resides if he has no domicile in this state; or where he is physically present if he has no residence in this state.

Article 4543: Proposed law changes the present law. First, it mandates personal service on the defendant in all cases. Domiciliary service will not be effective in interdiction suits. Second, it requires the mailing of notice to those with a possible interest in the defendant's interdiction.

Article 4544: Proposed law changes the present law. Under present law, every defendant who does not answer an interdiction petition through counsel is afforded an attorney. Proposed law continues to mandate the appointment of counsel in all interdiction cases, but it requires the petitioner's attorney affirmatively to move for the appointment of counsel if the defendant has either filed no answer, or has answered in proper person. Unlike present law, proposed law requires an attorney to personally visit his client and advise him of the allegations made in the petition, the nature of the interdiction proceeding, and the client's rights and options.

Article 4545: Present law provides that the court may appoint any person, including a health-care professional, to visit and to examine the defendant prior to an interdiction hearing. Proposed law retains the substance of present law but more fully defines the reporting requirements of any such court-appointed examiner. An appointed examiner is considered a court-appointed expert within the meaning of Louisiana Code of Evidence Article 706(A).

Article 4546: Proposed law changes the present law. While proposed law retains the present law procedure for notifying a defendant and his attorney of interdiction hearings, it adds the requirement that the petitioner/movant shall personally serve the notice on the defendant and give notice (by first-class mail) to other persons with a potential interest in the defendant's interdiction. The lack of proper notice to each other person will not affect the validity of the interdiction proceeding.

Article 4547: Proposed law changes the present law. While proposed law retains much of the present law regarding interdiction hearings, it changes the law by permitting the court to require the presence of any proposed curator at the interdiction hearing and by giving the defendant the right to be present at the hearing, to present evidence, to testify, and to cross examine witnesses. Proposed law further provides that the court shall not conduct the hearing in absence of the defendant, unless the court determines that good cause exists to do so. Proposed law further provides that the court hold the hearing where the defendant is

located if the defendant is unable to come to the courthouse.

Article 4548: Proposed law changes the present law by making it clear that the burden of proof in all interdiction proceedings is "clear and convincing evidence" rather than a "preponderance of the evidence".

Article 4549: Proposed law changes the present law. While proposed law retains much of the present law regarding preliminary and temporary interdiction enacted by the legislature in 1997, some differences exist. First, proposed law tracks to a greater extent the provisions of the Code of Civil Procedure relating to preliminary injunctions and temporary restraining orders and adopts that terminology rather than "provisional interdiction" and "ex parte provisional interdiction". Second, proposed law assures that there is no period during which the interdict is not protected by a curator pending a final interdiction hearing.

Article 4550: Proposed law resolves a conflict in the present law between C.C. Art. 397 (1870) and C.C.P. Art. 4551 by giving the court full discretion in awarding attorney fees and court costs, unless a judgment has been granted against the petitioner or the petition is dismissed on the merits.

Article 4551: Proposed law changes the present law that only a judgment of limited interdiction had to meet specified requirements. Proposed law provides a single code Article that sets forth all matters that must be addressed in every judgment of interdiction, including judgments of full interdiction, limited interdiction, and temporary or preliminary interdiction.

Article 4552: Proposed law changes the present law by requiring the clerk of court to record a notice of the filing of an interdiction suit in the mortgage records as well as the conveyance records of the parish in which the interdiction suit is pending. Proposed law allows a curator 15 days from his qualification, rather than 10 days from his appointment, to record an interdiction judgment in parishes other than the one in which judgment was rendered. Proposed law relieves the curator of the obligation to record a judgment of interdiction in the parish in which judgment was rendered because, the clerk of court has this responsibility.

Article 4553: Proposed law changes the present law in part. The phrase "(e)except for good cause shown", clarifies that there is no jurisdictional problem associated with a court other than that which rendered the interdiction judgment to conduct a post-judgment proceeding.

Article 4554: Proposed law retains the present law that on motion the court may modify or terminate its judgment when the court finds that the terms of that judgment are either excessive or insufficient or that the ability of the interdict has so changed as to warrant modification or termination.

Article 4555: Proposed law changes the present law by deleting the substance of present law, Civil Code Article 396 (1870), that provides for the "hearing of new proofs" in interdiction appeals.

Article 4556: Proposed law retains the present law for ancillary curatorship proceedings that allow the conservator of a ward residing outside of Louisiana to appear in court on behalf of the ward without qualifying as a curator when no curator has been appointed in this state and to perform acts affecting the property of the ward in accordance with the authority set forth in his letters when authorized by the court to do so.

Articles 4557 through 4560: Reserved

Article 4561: Proposed law changes the present law. Under present law, a defendant's pre-incapacity choice regarding a curator is given priority. Thereafter, the court must give preference to the defendant's spouse. Proposed law retains these preferences, but enumerates several others. Proposed law preserves the present law option of appointing separate curators over the interdict's person and over the interdict's property.

Article 4562: Proposed law changes the present law to permit the extension of the time period allowed for qualification as curator for good cause shown. Proposed law provides that a court rendering an interdiction judgment may issue protective orders to protect the interdict in the interim between appointment and qualification of the curator.

Article 4563: Proposed law changes the present law by permitting the substitution of a sworn descriptive list for an inventory in all cases. Proposed law changes the present law to clarify that the provisions setting forth special security rules for natural tutors have no application in the context of interdiction.

Article 4564: Proposed law changes the present law to require that letters set forth the date of qualification and the date, if any, on which the letters expire. Proposed law requires that letters of limited curatorship set forth the powers of the limited curator.

Article 4565: Proposed law changes the present law so that an undercurator is no longer empowered to act for the interdicted person when there is a conflict of interest between the curator and the interdict.

Article 4566: Proposed law does not change the present law by retaining extensive cross-references to tutorship articles governing management of a minor's affairs, but proposed law changes the present law by omitting cross-references that are not necessary or that are referred to elsewhere as a cross-reference or a provision of law. Proposed law further provides that the appointed curator shall have no authority to admit the defendant to a residential or long-term care facility absent a contradictory hearing.

Article 4567: Proposed law does not change the present law by allowing the curator to expend a portion of the revenue of the interdict as is necessary to care properly for his person or affairs, and with court authorization, to support his legal dependents. If the revenue is insufficient the curator may expend the interdict's capital, with court authorization in the manner provided by Article 4271.

Article 4568: Proposed law changes the present law to omit a provision establishing a maximum term of 10 years for certain curators.

Article 4569: Proposed law changes the present law by mandating the filing of a final account or personal report at the termination of every curator's appointment. Proposed law changes the present law to eliminate the requirement that all accounts be served and homologated.

Effective on July 1, 2001.

(Amends Title IX of Book I of the Civil Code, to comprise C.C. Arts. 389- 399, C.C. Arts. 1482 and 2319, Title VIII of Book VII of the Code of Civil Procedure, to comprise C.C.P. Arts. 4541-4556 and Arts. 4561-4569; Repeals R.S. 9:1001-1004)