HLS 14RS-2081 ENGROSSED

Regular Session, 2014

HOUSE BILL NO. 1133

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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

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:

CODING: Words in struck through type are deletions from existing law; words <u>underscored</u> are additions.

1	CHAPTER 2-A. ACTION TO REVIEW THE ACTS OF A MANDATARY
2	§3851. Who may file; petition contents; service; venue
3	A. When a principal is a natural person for whom a curator with appropriate
4	authority has not qualified, any of the following persons may petition a court on
5	behalf of the principal to review the acts of the principal's mandatary and to grant
6	relief authorized by this Chapter:
7	(1) A person authorized to make healthcare decisions for the principal.
8	(2) A spouse, a parent, or a descendant of the principal.
9	(3) A presumptive heir or legatee of the principal.
10	(4) A person named as a beneficiary to receive any real or personal right
11	upon the death of the principal.
12	(5) A trustee or beneficiary of an inter vivos or testamentary trust created by
13	or for the principal.
14	(6) A caregiver of the principal.
15	(7) Any other person with sufficient interest in the welfare of the principal.
16	B. The petition shall be verified and shall name as defendants the principal,
17	the mandatary, and any other person against whom relief is sought. The petition
18	shall state with particularity the facts establishing the petitioner's right to bring the
19	action, the reasons that a review of the acts of the mandatary is needed, and the relief
20	sought.
21	C. The principal shall be personally served with the citation and petition.
22	Service on the principal through a mandatary shall not be effective.
23	D. The action shall be filed in the parish where the principal is domiciled,
24	where the principal resides if without a domicile in this state, or where the principal
25	is physically present or where immovable property of the principal is located if the
26	principal is without either a domicile or a residence in this state.
27	Comments - 2014
28 29 30 31	(a) Because a mandate is generally durable under Louisiana law, it is likely that a mandatary will continue to act for a principal after the principal is no longer able to monitor the performance of the mandatary. This Chapter creates a new right of action to allow persons other than the principal to initiate an action against a

1 2 3 4 5 6	mandatary. This right of action is not available when the principal is not a natural person, or when a curator has qualified, as other law governs those claims. This Chapter has no impact on the authority that a principal has under any other law to control the actions of a mandatary, to terminate a mandate, or to recover property or damages from a mandatary; it merely authorizes additional parties to bring those claims on the principal's behalf.
7	(b) Civil Code Articles 880 - 901 govern who is a presumptive heir.
8 9 10 11 12 13	(c) Governmental agencies are omitted from the list of those who may file an action under this Chapter because they have authority to bring actions under other laws. See, for example, R.S. 14:67.21 (Theft of the assets of an aged person or disabled person), R.S. 14:93.3, (Cruelty to the infirmed), R.S. 14:93.4 (Exploitation of the infirmed), R.S. 15:1501-1511 (Adult Protective Services Act) and R.S. 46:437.1 et seq. (Medical Assistance Programs Integrity Law).
14 15 16	(d) As Civil Code Article 2988 generally applies the rules of mandate to procurations, an action under this Chapter may be brought against a representative with respect to a procuration. See R.S. 9:3856.
17 18 19 20	(e) The principal must be named as a defendant and must be personally served with the petition and citation to ensure the principal has actual notice of the action. The petition may also name a person other than the mandatary and the principal as a defendant.
21 22	(f) The petition must include a detailed explanation of the objectionable acts and the reasons for the objection.
23 24 25 26	(g) This Chapter imposes a heightened pleading standard and requires a verified petition to discourage plaintiffs from filing frivolous suits. As an additional disincentive to frivolous suits, the prevailing party may be awarded costs and attorney fees under R.S. 9:3855.
27 28	(h) Subsection D addresses venue only and is not intended to create personal jurisdiction over any defendant.
29 30 31	(i) An action under this Chapter shall be by ordinary process, but the use of summary proceedings is available to address incidental questions arising in the course of the action. See C.C.P. Art. 2592(1).
32 33	(j) R.S. 9:3854(D) permits a court to order injunctive relief without a 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. (c) The principal must be present in person at the hearing to allow the court 12 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	(9) The ability of the principal to comprehend generally the nature and
2	consequences of the acts of the mandatary.
3	(10) The donee's knowledge or imputed knowledge that a donation was not
4	for the benefit or gratification of the principal.
5	(11) The good or bad faith of a defendant.
6	D. Unauthorized acts by or with the consent of a mandatary are subject to
7	injunctive relief without a showing of irreparable injury.
8	Comments - 2014
9 10 11 12	(a) This Chapter allows a person other than the principal to ask for court review of the acts of a mandatary. It does not create new standards of behavior for the mandatary. After a hearing, a court can order any relief to which the principal is entitled if the principal had brought the claim against the mandatary.
13 14 15 16 17	(b) A court may take actions normally reserved to the principal such as terminating some or all of the authority granted by the mandate or collecting funds due to the principal. If a court enjoins a mandatary from acting, this Section authorizes the court to appoint a person to handle the principal's affairs until disposition of the action. A principal apparently unable to make reasoned decisions may also be unable to name a new mandatary.
19 20 21 22 23 24	(c) This Section expressly authorizes the court to gather information from financial institutions and healthcare providers, and to appoint an investigator. R.S. 13:3715.1 permits a court to issue an order for the production of a patient's records, but only after a contradictory hearing. This Section, however, allows the court to obtain medical records without a contradictory hearing. A court order to provide financial records under this Section is not subject to the requirements of R.S. 6:333.
25 26	(d) The list of factors for the court to consider offers guidance. It is illustrative and not exhaustive.
27 28 29	(e) An action under this Chapter is by ordinary process, but summary proceedings are available to address incidental questions arising in the course of the action. See C.C.P. Art. 2592(1).
30 31 32 33	(f) Code of Civil Procedure Article 3601 allows a court to issue an injunction "where irreparable injury, loss, or damage may otherwise result to the applicant or in other cases specifically provided by law". Subsection D permits a court to order injunctive relief without a showing of irreparable injury.
34	§3855. Payment of costs and attorney fees
35	The court may render judgment for costs and attorney fees, or any part
36	thereof, against any party. Nevertheless, costs or attorney fees shall not be awarded
37	to a petitioner when the petition is dismissed on the merits.

1	Comments - 2014
2 3 4	(a) Court costs and attorney fees are allowed to discourage frivolous suits or to reimburse the petitioner who initiates an action under this Chapter to benefit the principal.
5 6 7	(b) The principal may be responsible for reimbursing the mandatary for expenses incurred in carrying out the mandate, as provided in Civil Code Article 3012.
8	§3856. Applicability
9	A. This Chapter applies to a procuration and a representative in the same
0	manner as it applies to a mandate and a mandatary, respectively, and allows an action
1	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
l6 l7	(a) Civil Code Article 2988 subjects a procuration to the rules governing mandate.
18 19 20 21 22 23	(b) This Chapter creates a new right of action to protect the interests of a principal when a mandatary is no longer prudently fulfilling the mandate. This protection may not be appropriate for all mandates. This Section excludes from this protection a mandate made in the interest of the mandatary or a third person when the principal agrees that the mandate is irrevocable and when the law allows the mandate to be irrevocable.
24 25 26 27	(c) Civil Code Article 3025 governs when the parties may agree to make a mandate irrevocable. A common occasion for irrevocability involves creditors who require an irrevocable mandate in case a debtor defaults. The "third party" identified 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

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2	principal.
3	Comment - 2014
4 5 6 7 8	The duty of the mandatary to notify someone other than the principal when the mandatary believes the principal lacks capacity does not impose a duty on the person notified to accept any responsibility or to take any action. The mandatary remains responsible for the consequences of his failure to fulfill the mandate until 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 mandatary 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	$\underline{\text{of}}$ 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.

the mandatary notifies a person with a sufficient interest in the welfare of the

1 B. A federally insured financial institution shall not be liable for transactions 2 or activity by an agent, representative, or mandatary 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 mandatary by authorizing an individual with an interest to request the court to review the acts of the mandatary and to grant appropriate relief.

<u>Proposed law</u> (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.

<u>Proposed law</u> (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 mandatary's act and is not subject to fraud, duress, or undue influence.

<u>Proposed law</u> (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.

<u>Proposed law</u> (R.S. 9:3854) provides that if the court finds that the mandatary has violated a duty, it may grant any relief to which the principal is entitled and may also enjoin a mandatary 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 mandatary, temporarily enjoining a mandatary from exercising all or some of the

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

<u>Proposed law</u> 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.

<u>Proposed law</u> (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.

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

<u>Present law</u> (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.

<u>Proposed law</u> retains <u>present law</u> 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.

<u>Present law</u> (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.

<u>Present law</u> 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.

<u>Proposed law</u> retains <u>present law</u>, 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.

<u>Present law</u> (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.

<u>Proposed law</u> retains <u>present law</u> 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)