Regular Session, 2014

HOUSE BILL NO. 1133

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BY REPRESENTATIVE TIM BURNS

(On Recommendation of the Louisiana State Law Institute)

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:
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 25 26 27 28 29 30 31 32 33	(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 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.
34	(b) Civil Code Articles 880 - 901 govern who is a presumptive heir.

(c) Governmental agencies are omitted from the list of those who may file

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2 3 4 5 6	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).
7 8 9	(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.
10 11 12 13	(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.
14 15	(f) The petition must include a detailed explanation of the objectionable acts and the reasons for the objection.
16 17 18 19	(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.
20 21	(h) Subsection D addresses venue only and is not intended to create personal jurisdiction over any defendant.
22 23 24	(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).
25 26	(j) R.S. 9:3854(D) permits a court to order injunctive relief without a 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 37 38 39 40 41	(a) A principal may choose to file a motion to dismiss the action. Before ruling on the principal's motion to dismiss, the court must hold a hearing to determine whether the principal is aware of the acts of the mandatary and not subject to fraud, duress, or undue influence, is able to comprehend generally the nature and consequences of the acts of the mandatary, and appears able to make reasoned decisions.

(b) When a principal is aware of the acts of the mandatary, and is not subject

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2 3 4	to fraud, duress, or undue influence, and is able to comprehend generally the nature and consequences of the acts of the mandatary, the court must grant the principal's motion to dismiss.
5 6 7 8 9 10 11	(c) The principal must be present in person at the hearing to allow the court to make the determinations described in this Section. The parties may agree to, or the court may order, remote testimony. The standard for permitting a principal to be absent from the proceeding, for good cause shown, is a lower standard than is required by Code of Civil Procedure Article 1633.1, which allows testimony by visual remote technology under compelling circumstances. This lower standard 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 18 19 20 21 22 23	(a) The principal's death terminates the mandate. This Section permits the principal's legal successor to be substituted for the petitioner in an action under this Chapter. The legal successor may then elect to continue or to dismiss the action. Conflicts of interest may arise when the succession representative is also the defendant in the action. Under other laws, presumptive heirs and legatees may challenge the appointment of a succession representative they deem to be unfit or may bring an action against a succession representative.
24 25 26 27 28 29	(b) Full interdiction also terminates the mandate. A court may terminate a mandate in a limited interdiction by placing the property subject to the mandate under the authority of a curator. A curator, once qualified, can be substituted for the petitioner and may then elect to continue or to dismiss the suit. Temporary or preliminary interdictions have no effect on the action; it remains available during a temporary or preliminary interdiction.
30 31 32	(c) Allowing substitution avoids res judicata issues. The existing action continues with the new parties. Where prescription was interrupted by the commencement of an action under this Chapter, that interruption continues.
33	<u>§3854. Relief</u>
34	A. If the court finds that a mandatary has violated a duty or failed to perform
35	any obligation as a mandatary, the court may:
36	(1) Grant any relief to which the principal is entitled.
37	(2) Enjoin the mandatary 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 mandatary.

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	<u>act.</u>
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.

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1	D. Unauthorized acts by or with the consent of a mandatary are subject to
2	injunctive relief without a showing of irreparable injury.
3	Comments - 2014
4	(a) This Chapter allows a person other than the principal to ask for court
4 5	review of the acts of a mandatary. It does not create new standards of behavior for
6	the mandatary. After a hearing, a court can order any relief to which the principal
7	is entitled if the principal had brought the claim against the mandatary.
8	(b) A court may take actions normally reserved to the principal such as
9	terminating some or all of the authority granted by the mandate or collecting funds
10	due to the principal. If a court enjoins a mandatary from acting, this Section
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11	authorizes the court to appoint a person to handle the principal's affairs until
11 12 13	disposition of the action. A principal apparently unable to make reasoned decisions
13	may also be unable to name a new mandatary.
14 15 16	(c) This Section expressly authorizes the court to gather information from
15	financial institutions and healthcare providers, and to appoint an investigator. R.S.
16	13:3715.1 permits a court to issue an order for the production of a patient's records,
17	but only after a contradictory hearing. This Section, however, allows the court to
18	obtain medical records without a contradictory hearing. A court order to provide
19	financial records under this Section is not subject to the requirements of R.S. 6:333.
20	(d) The list of factors for the court to consider offers guidance. It is
21	illustrative and not exhaustive.
22	(e) An action under this Chapter is by ordinary process, but summary
23	proceedings are available to address incidental questions arising in the course of the
22 23 24	action. See C.C.P. Art. 2592(1).
25	(f) Code of Civil Procedure Article 3601 allows a court to issue an injunction
26	"where irreparable injury, loss, or damage may otherwise result to the applicant or
27	in other cases specifically provided by law". Subsection D permits a court to
28	order injunctive relief without a showing of irreparable injury.
	order injunctive rener without a showing or irreparable injury.
29	§3855. Payment of costs and attorney fees
30	The court may render judgment for costs and attorney fees, or any part
31	thereof, against any party. Nevertheless, costs or attorney fees shall not be awarded
32	to a petitioner when the petition is dismissed on the merits.
33	Comments - 2014
34	(a) Court costs and attorney fees are allowed to discourage frivolous suits or
35	to reimburse the petitioner who initiates an action under this Chapter to benefit the
36	principal.
37	(b) The principal may be responsible for reimbursing the mandatary for
38	expenses incurred in carrying out the mandate, as provided in Civil Code Article
39	3012.

<u>§3856.</u>	Applicability	y

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

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

Comments - 2014

- (a) Civil Code Article 2988 subjects a procuration to the rules governing mandate.
- (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.
- (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.
- Section 2. Civil Code Article 3029 is hereby amended and reenacted to read as follows:

Art. 3029. Termination by the mandatary

The mandate and the authority of the mandatary terminate when he the mandatary notifies the principal of his resignation or renunciation of his authority. When a mandatary has reasonable grounds to believe that the principal lacks capacity, the termination is effective only when the mandatary notifies another mandatary or a designated successor mandatary. In the absence of another mandatary or a designated successor mandatary, the termination is effective when the mandatary notifies a person with a sufficient interest in the welfare of the principal.

Comment - 2014

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

1 2	remains responsible for the consequences of his failure to fulfill the mandate until proper notice is given.
3	Section 3. R.S. 6:311.1 and 333(B)(introductory paragraph) are hereby amended and

reenacted to read as follows:

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

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

- (2) Written notice shall be deemed to be received upon receipt by an officer of the federally insured financial institution.
- (3) For the purposes of this Section, "written notice" shall mean a <u>court order</u> or <u>other</u> writing addressed to the federally insured financial institution indicating that the <u>principal power of attorney, procuration, or mandate</u> has <u>been revoked, modified, or terminated</u>, the authority of the agent, or indicating that one of the events of termination as specified in <u>including a termination pursuant to</u> Civil Code Article 3024 has occurred.
- B. A federally insured financial institution shall not be liable for transactions or activity by an agent, representative, or mandatary occurring prior to the receipt of written notice and a reasonable opportunity to act on it.

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

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APPROVED: