



LOUISIANA STATE LAW INSTITUTE

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June 16, 2014

Representative Charles "Chuck" Kleckley  
Speaker of the House of Representatives  
P.O. Box 94062  
Baton Rouge, Louisiana 70804-9062

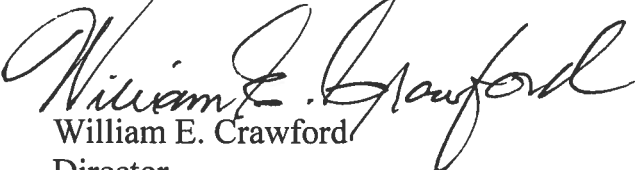
RE: HR 112 of 2009

Dear Mr. Speaker:

The Louisiana State Law Institute respectfully submits herewith its report to the legislature in response to 2009 House Resolution No. 112, relative to powers of attorney for the elderly.

Please note that pursuant to Acts 2014, No. 356, Louisiana law now contains the legislation proposed in Attachment II of this report.

Sincerely,

  
William E. Crawford  
Director

WEC/puc

Enclosure

cc: Representative Timothy G. "Tim" Burns

email cc: David R. Poynter Legislative Research Library  
[drplibrary@legis.la.us](mailto:drplibrary@legis.la.us)  
Secretary of State, Mr. Tom Schedler  
[admin@sos.louisiana.gov](mailto:admin@sos.louisiana.gov)

**LOUISIANA STATE LAW INSTITUTE**

**POWER OF ATTORNEY FOR THE ELDERLY COMMITTEE**

**REPORT TO THE LOUISIANA LEGISLATURE**

**IN RESPONSE TO HR 112 OF 2009 REGULAR SESSION  
(Power of Attorney for the Elderly)**

**June 16, 2014**  
**Baton Rouge**

Evelyn Wilson  
Reporter

Joseph Baiamonte  
Staff Attorney

6.16.14

## POWER OF ATTORNEY FOR THE ELDERLY COMMITTEE

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Evelyn Wilson, Reporter

Joseph Baiamonte, Staff Attorney

1 June 16, 2014

2  
3 TO: Representative Charles "Chuck" Kleckley  
4 Speaker of the House of Representatives  
5 P.O. Box 94062  
6 Baton Rouge, Louisiana 70804

7  
8 **REPORT TO THE LEGISLATURE IN RESPONSE TO HR 112 OF THE 2009**  
9 **REGULAR SESSION RELATIVE TO POWERS OF ATTORNEY**  
10 **FOR THE ELDERLY**  
11

12 House Resolution 112 of 2009, (see Attachment I), requested the Louisiana State Law  
13 Institute to study and make recommendations relative to the implementation of  
14 safeguards for elderly persons executing powers of attorney and to report its findings to  
15 the legislature. In response to this resolution, the Louisiana State Law Institute formed  
16 the Power of Attorney for the Elderly Committee. The Committee's membership  
17 represents various interests in the area of elderly abuse and estate planning, and boasts  
18 membership from the bench, the bar, and governmental entities. The Committee has met  
19 frequently over the past four and a half years and submits this report of its findings and  
20 recommendations, including the proposed legislation in Attachment II.

21  
22 A mandate, or power of attorney, is, among other things, an extraordinarily efficient  
23 property management tool. Through the use of the procuration or the contract of mandate,  
24 Louisiana's citizens can plan for their potential incapacity by making arrangements for  
25 someone other than themselves to properly manage their affairs. Louisiana's law on  
26 representation and mandate, commonly referred to by its common-law appellation,  
27 "Power of Attorney," allows a person, the "principal," to authorize one or more  
28 designated other persons, "mandataries" or "representatives," to act for, in the name of,  
29 and on behalf of, the principal. Louisiana's mandates are always "durable" in that they  
30 continue in effect after the principal loses capacity to act for himself.

31 Although Louisiana law provides many protections for those principals who use this  
32 device, representatives and mandataries have been known to abuse their authority for  
33 their personal advantage, at the expense of the principal. Regrettably, elderly persons  
34 have quite frequently been ready targets for abuse and fraud.

35 It is with the goal of curbing this abuse, especially when the victim is elderly or infirm,  
36 that this committee makes its recommendations. Among other sources of information, the  
37 committee reviewed the Uniform Power of Attorney Act, the comparison of Current State  
38 Laws with the Uniform Power of Attorney Act prepared by Lori A. Stiegel and Ellen  
39 VanCleave Klem of the American Bar Association, and various law review articles. It  
40 also reviewed current Louisiana law and practices.

1 **I. FINDINGS**

2 **A. The advantages of a mandate are many, especially when compared to an**  
3 **interdiction proceeding or a living trust.**

4 **1. A mandate is inexpensive and efficient.**

5 The preparation and execution of a mandate is usually a quick and inexpensive process.  
6 Costs, including an appropriate meeting with the attorney or notary, are nominal. If a  
7 person becomes incapacitated and does not have a mandate in place, an interdiction  
8 proceeding may be necessary. The interdiction process, even if uncontested, normally  
9 costs \$3,000 to \$5,000, and generally takes two to three months.

10 **2. The principal makes major decisions.**

11 When executing a mandate, a principal affirmatively names a mandatary to manage his  
12 affairs. The selection of the mandatary lies entirely with the principal. The principal may  
13 name one mandatary, co-mandataries, or successor mandataries. In the mandate, the  
14 principal may restrict or limit the authority of the mandatary beyond those restrictions  
15 imposed by Louisiana law. The principal may appoint one mandatary for financial  
16 matters and another for health-related issues, or otherwise divide responsibilities among  
17 mandataries.

18 The interdict makes no decisions with respect to who will be in charge of his affairs after  
19 he is interdicted.

20 **3. A mandate is generally a private matter.**

21 With the stroke of a pen, a person can appoint another to represent him in his legal  
22 relations and to transact his business. The decision to create a mandate is private, and the  
23 content of the mandate, as well as the authority conferred on the mandatary, need not be  
24 disclosed to any person other than the mandatary and those persons asked to accept the  
25 authority of the mandatary. A mandate may also be conditioned on the incapacity of the  
26 principal, thus remaining completely private until the incapacity occurs.

27 In contrast, an interdiction is a public and difficult process. As part of the process, the  
28 party requesting the interdiction, who is usually a family member, is forced to present  
29 evidence of the proffered interdict's incapacity in the proffered interdict's presence. In  
30 addition to being extraordinarily expensive, the process can strip a proffered interdict of  
31 dignity, cause permanent harm to the relationship between the proffered interdict and the  
32 person seeking the interdiction, and be detrimental to the overall well-being of the  
33 proffered interdict.

1 **4. The principal can revoke the mandate.**

2 A principal with capacity may revoke the mandate at any time, without any involvement  
3 of the court. Louisiana’s law of mandate allows a principal to prepare for his incapacity  
4 by selecting and directing a mandatary while he is able to do so. He may allow a  
5 mandatary to serve while he has capacity, observe the mandatary, then reconsider or  
6 affirm his choice.

7 **5. The mandate does not involve the disposition of the principal’s assets at his death.**

8 A mandate is useful during the lifetime of the principal to enable capable management of  
9 the principal’s assets and health care. Upon the death of the principal, the authority  
10 granted under a mandate automatically terminates, and the principal’s assets are  
11 distributed either in accordance with the principal’s testament or under Louisiana’s law of  
12 intestacy. If the laws regarding mandates become overly burdensome, they may  
13 unintentionally encourage the marketing of inter vivos revocable trusts (i.e., “living  
14 trusts”). In contrast to mandates, living trust arrangements generally control the  
15 disposition of the principal’s assets even beyond the principal’s death, often in a manner  
16 that the principal may not fully anticipate.

17 **B. Protection for the principal**

18  
19 Civil Code Articles 2989 – 3032 govern mandates and provide many protections for the  
20 principal. In 1997, upon recommendation of the Louisiana State Law Institute, the  
21 legislature adopted revisions to these articles. The articles, as now written, with few  
22 exceptions, enable a principal to monitor a mandatary and to terminate the mandate at  
23 any time. They do not contemplate or provide for control over a mandatary after the  
24 principal is no longer able to direct the mandatary.

25 **1. Protections for the principal established in law**

26 The Louisiana Civil Code provides specific protections for the principal by limiting the  
27 general authority of the mandatary in the absence of express and specific authorization.

28 • **No compensation due**

29 A mandatary is not entitled to compensation unless the principal agrees to  
30 compensate the mandatary. C.C. Art. 2992.

31 • **Express authority required**

32 Unless expressly authorized by the principal, a mandatary may not, in the name of  
33 the principal:

34 (1) Alienate, acquire, encumber, or lease immovable property. C.C. Art. 2996.

35 (2) Make an inter vivos donation or revoke a donation. C.C. Art. 2997.

36 (3) Accept or renounce a succession. C.C. Art. 2997.

- 1 (4) Contract a loan, acknowledge or remit a debt, or become a surety. C.C. Art.  
2 2997.
- 3 (5) Draw or endorse promissory notes and negotiable instruments. C.C. Art. 2997.
- 4 (6) Enter into a compromise or refer a matter to arbitration. C.C. Art. 2997.
- 5 (7) Make health care decisions involving surgery, medical expenses, nursing home  
6 residency, and medication. C.C. Art. 2997.
- 7 (8) Appoint a substitute mandatary, unless the interest of the principal so requires  
8 when unforeseen circumstances prevent the mandatary from acting to fulfill his  
9 duty. C.C. Art. 3006.

10 • **Contracting with one's self**

11 Except when fulfilling a duty to the principal, a mandatary may not bind the  
12 principal to a contract with the mandatary. C.C. Art. 2998.

13 • **Mandatary's duty to perform; standard of care**

14 A mandatary is bound to fulfill his duty with prudence and diligence, and is  
15 responsible for loss caused from his failure to properly perform that duty. C.C.  
16 Art. 3001.

17 • **Accountability**

18 A mandatary is accountable to the principal and is bound to provide information  
19 and an accounting upon the request of the principal, or when the circumstances  
20 require. C.C. Art. 3003. The mandatary is bound to account for his performance  
21 upon termination of the mandate unless the principal expressly relieves the  
22 mandatary of this obligation. C.C. Art. 3032.

23 • **Automatic termination of the mandate or authority of the mandatary**

24 A mandate terminates upon the death of the principal or the mandatary, on the  
25 interdiction of the mandatary, and on the qualification of a curator when the  
26 principal is interdicted. C.C. Art. 3024.

27 • **Principal may terminate the mandate**

28 The principal may terminate the mandate and the authority of the mandatary at any  
29 time. A mandate in the interest of the principal, and also of the mandatary or of a  
30 third party, may be irrevocable, if the parties so agree, for as long as the object of  
31 the contract may require. C.C. Art. 3025.

32 **2. Incomplete protection for the principal**

33 Mandates in Louisiana are generally "durable" in that they continue to have full effect  
34 even after the principal loses capacity or becomes disabled to the extent that express  
35 revocation of the mandate by the principal is impractical or impossible. C.C. Art. 3026.  
36 Our law neither contemplates nor provides for oversight of a mandatary when the  
37 principal is no longer competent to direct the mandatary, short of a judgment of

1 interdiction and the qualification of a curator. Louisiana's law of mandate governs  
2 transactions not generally included in the law of agency in most other jurisdictions in the  
3 United States and does not impose upon the mandatary a fiduciary duty of loyalty to the  
4 principal. The law of contract applies to a mandate and authorizes a mandatary to act in  
5 accordance with the mandate even when not for the benefit of the principal.

6 **C. Financial Abuse of the elderly and disabled: malfeasance or nonfeasance of**  
7 **mandataries**

8 **1. Investigation and prosecution of offenses committed against the infirmed**

9 The Louisiana Medicaid Fraud Control Unit (MFCU), part of the Criminal Division of  
10 the state Attorney General's Office, investigates and prosecutes criminal offenses against  
11 those who financially abuse the elderly and disabled. The crime of *Exploitation of the*  
12 *infirmed*, R.S. 14:93.4, includes "The use of an infirmed person's or aged person's, or  
13 disabled adult's power of attorney or guardianship for one's own profit or advantage by  
14 means of fraudulent conduct, practices, or representations."

15 During the 11 month period from January 1, 2010, to November 24, 2010, the MFCU  
16 received 1,718 complaints or reports of physical abuse, financial abuse, and fraud. During  
17 this same period, it initiated 145 fraud investigations, 161 physical abuse/neglect  
18 investigations, and 12 financial abuse investigations. From July 1, 2011 through June 30,  
19 2012 the MFCU initiated 329 cases. Of that number, 88 involved abuse and exploitation  
20 – with approximately 60% involving some form of financial exploitation.

21 The Department of Health and Hospitals (DHH) houses the state office of Elderly  
22 Protective Services (EPS). EPS is responsible for investigating reports and arranging  
23 services to protect vulnerable adults/elders at risk of abuse, neglect, exploitation and  
24 extortion.

25 From July 1, 2007, through September 27, 2012, EPS statewide accepted for  
26 investigation 23,360 reports of abuse, neglect, and exploitation that were received  
27 through the elder abuse hotlines throughout the state. A total of 3,445 of those 23,360  
28 reports concerned financial exploitation and extortion. EPS made a total of 1,200  
29 financially related referrals on substantiated cases of abuse related to Social Security,  
30 SSI, money management, credit card fraud, debt counseling, food stamps, energy  
31 assistance, and representative payees.

32 **2. Malfeasance or nonfeasance of mandataries**

33 Boilerplate mandate forms afford mandataries unrestricted access to the property of the  
34 principal. It is not uncommon for investigations to uncover instances where the  
35 mandatary has:



- 1 • Drawn on a principal's funds to pay a mandatary's personal bills and expenses that
- 2 are unrelated to the care of the principal.
- 3 • Secured loans with a mortgage on the principal's immovable property and
- 4 converted the proceeds of mortgage loans to the mandatary's use.
- 5 • Surrendered life-insurance policies for their cash value and converted the funds.
- 6 • Changed beneficiary names on insurance, retirement, mutual funds, and other
- 7 financial accounts.
- 8 • Obtained credit cards in the name of the principal.
- 9 • Obtained cell-phones and airtime for personal use, using a principal's funds and
- 10 name.
- 11 • Embarked on personal shopping sprees using the principal's money.

### 12 **3. An absence of family involvement allows caretakers to misuse funds of a**

### 13 **principal.**

14 As Medicaid funds have become increasingly available to pay for care in a person's

15 home, there has been a steady rise in abuse of mandates by caretakers. A common factor

16 of elderly abuse by a caretaker is the absence of family involvement in the life of the

17 victim. The family, basically, turns the victim over to someone, often a stranger sent by a

18 home health agency, and rarely, if ever, checks on the elderly family member until the

19 victim's money is gone. The victims of these unscrupulous caretakers end up in nursing

20 homes after their resources have been depleted. This financial exploitation of victims is

21 frequently coupled with neglect or physical abuse.

### 22 **4. Family members who are caretakers express their frustration by abusing funds of**

### 23 **the principal.**

24 When the perpetrator of elderly abuse is a family member, he or she is often the only

25 caretaker for the victim, getting little or no help from other family members. This family

26 member often enters the caretaking without intending abuse, then, over time, begins to

27 misuse the victim's assets, justifying his actions as payment for his services. There is no

28 oversight or any other kind of check-and-balance.

### 29 **5. Principals may lack capacity to create the mandate.**

30 Sometimes the issue is whether the victim had capacity to execute a mandate at the time

31 of its execution. The principal may have been unable to make or communicate reasoned

32 decisions on the date of the mandate.

33 Where indicated, the MFCU will look to the medical condition of the principal to try to

34 determine the principal's capacity at the time the mandate was executed. A diagnosis of

35 dementia may assist in proving that the principal did not understand the mandate or what

36 acts the mandate authorized, or that the principal did not authorize the agent to use the

37 principal's assets in the manner in which they were used by the mandatary. Medical

1 professionals do not always agree on a definition of capacity or when an individual no  
2 longer has capacity. There is no standard answer in a criminal case.

3 **6. Difficulties encountered in locating the notary and the witnesses may hinder a**  
4 **thorough investigation.**

5 The MFCU always attempts to locate the notary and the witnesses to the principal's  
6 signature on the mandate to secure information concerning the circumstances surrounding  
7 the execution of the act of mandate. It is not uncommon to find that the signature  
8 represented as that of a notary is illegible, with neither a printed name nor a notary  
9 identification number written on the document. Names of the witnesses are, likewise,  
10 frequently illegible and not printed on the document. Some cases clearly indicate that the  
11 person who signed as notary was not a notary.

12 **II. RECOMMENDATIONS**

13 At its November 2011 meeting, the Council approved a new cause of action to  
14 allow persons other than the principal to petition the court to review whether a mandatory  
15 is abusing the power of attorney. The Council now recommends the proposed legislation  
16 found in Attachment II.

17 In addition, the Council recommends the following actions to combat the financial  
18 abuse of the elderly through the misuse of mandates:

19 **1. Encourage community awareness**

20 Encourage the American Association of Retired Persons (AARP), DHH's Office of  
21 Elderly Protective Services (EPS), and the several Councils on Aging across the state to  
22 educate and inform their service populations on the potential for financial abuse of the  
23 elderly. Provide funding for such programs.

24 **2. Increase judges' and attorneys' awareness**

25 Encourage judges, attorneys, and prosecutors to attend continuing legal education  
26 programs that provide instruction on identifying, preventing, and punishing elder abuse,  
27 exploitation, and neglect, including undue influence, domestic abuse, and diminished  
28 capacity abuse.

29 **3. Educate mandataries in their duty**

30 Request that the Louisiana State Bar Association Access to Justice Committee Elder Law  
31 Task Force prepare a plain language explanation of mandatory powers and  
32 responsibilities to place on the websites: [www.LouisianaLawHelp.org](http://www.LouisianaLawHelp.org) and  
33 [www.goea.la.gov](http://www.goea.la.gov).

34

1 **4. Encourage notary awareness**

2 Request that the Office of the Secretary of State include, in its letter sent to notaries with  
3 its annual report forms, information from Elderly Protective Services explaining how to  
4 identify and report possible elder abuse, exploitation, or neglect, including undue  
5 influence, domestic abuse, and diminished capacity abuse.

6 **5. Encourage district attorneys to prosecute malfeasant notaries**

7 Request that district attorneys more aggressively investigate allegations of and prosecute  
8 for notarial malfeasance or under other applicable criminal statutes. A notary public who  
9 executed a mandate when he knew or should have known that the principal lacked  
10 capacity to grant a mandate, or a notary who falsely represented that a principal or  
11 witnesses signed the act in his presence, or in any other manner was complicit in a  
12 fraudulent transaction, has violated the law.

1 ATTACHMENT I

2 ENROLLED

3 Regular Session, 2009

4 HOUSE RESOLUTION NO. 112

5 BY REPRESENTATIVE TIM BURNS

6 A RESOLUTION

7 To urge and request the Louisiana State Law Institute to study and make recommendations relative to  
8 the implementation of safeguards for elderly persons executing powers of attorney and to  
9 report its findings to the legislature.

10 WHEREAS, the state of Louisiana, and all of American society, is currently  
11 experiencing a revolutionary surge in the growth of the elderly population; and

12 WHEREAS, as persons age, they are faced with increasing financial and health concerns  
13 which may limit their ability to be self-sufficient in terms of physical abilities, management of their  
14 finances, and decisions regarding their health; and

15 WHEREAS, many elderly persons are faced with difficult decisions when deciding whether  
16 to execute general or medical powers of attorney and who to entrust with the authority to make  
17 many serious medical and financial decisions on their behalf; and

18 WHEREAS, many elderly persons are vulnerable to incidents in which the powers they  
19 grant to others are abused to their detriment, and the elderly deserve the highest amount of  
20 protection from any abuses.

21 THEREFORE, BE IT RESOLVED that the House of Representatives of the  
22 Legislature of Louisiana does hereby urge and request that the Louisiana State Law Institute study  
23 the implementation of safeguards for elderly persons executing powers of attorney so that they may

1 be protected by law, even if they are unable to adequately protect themselves, and to determine if any  
2 other legislative changes should be made and report its findings and recommendations to the  
3 legislature.

4 BE IT FURTHER RESOLVED that a suitable copy of this Resolution be transmitted to the  
5 director of the Louisiana State Law Institute and that the Louisiana State Law Institute report its  
6 findings and recommendations to the Legislature of Louisiana on or before January 1, 2011.

7 SPEAKER OF THE HOUSE OF REPRESENTATIVES

1 **SUMMARY OF PROPOSED LEGISLATION**  
2

3 The proposed legislation is to be placed in TITLE 9, in a new Chapter 2-A of CODE  
4 BOOK III, CODE TITLE XV – OF MANDATE. It authorizes an interested person to petition a  
5 court on the principal’s behalf to review the acts of a mandatary. The petition filed must be  
6 verified and must state with particularity the reasons court action is needed. In addition, the  
7 proposed legislation, codifying current case law, imposes a duty of loyalty on a mandatary when  
8 the contract of mandate serves the exclusive interest of the principal. The court is expected to  
9 respond to the allegations using existing law applicable to the principal-mandatary relationship,  
10 including the newly codified duty of loyalty.

11  
12 A principal may choose to file a motion to dismiss the litigation. When a principal files a  
13 motion to dismiss this action the court must hold a hearing to determine whether the principal is  
14 aware of the acts of the mandatary and not subject to fraud, duress, or undue influence, and  
15 whether the principal appears able to make reasoned decisions, before granting the principal’s  
16 motion to dismiss.

17  
18 When a principal is aware of the acts of the mandatary, and is not subject to fraud, duress,  
19 or undue influence, the court shall grant the principal's motion to dismiss. The principal must be  
20 present in person or by suitable electronic means at this hearing to allow the court to make these  
21 determinations.

22  
23 This legislation expressly authorizes the court to collect information from financial  
24 institutions and health care providers to use in reaching its decision. The court may appoint an  
25 investigator. It may enjoin a mandatary from exercising all or some of the powers granted by the  
26 mandate, and may appoint an interim mandatary pending a decision. Injunctive relief is  
27 available without a showing of irreparable injury.

28  
29 The legislation allows an assessment of reasonable costs and attorney fees. It will not  
30 apply to irrevocable mandates.  
31

1 ATTACHMENT II

2 TITLE 9

3 CODE BOOK III

4 CODE TITLE XV – OF MANDATE

5 Enact Chapter 2-A

6 Chapter 2-A. ACTION TO REVIEW THE ACTS OF A MANDATARY

7  
8 § 3851. Who may file; petition contents; service; venue

9  
10 A. When the principal is a natural person, and a curator with appropriate authority  
11 has not qualified, any of the following persons may petition a court on the principal's behalf to  
12 review the acts of a mandatarly and to grant relief authorized by this Chapter:

- 13  
14 (1) A person authorized to make healthcare decisions for the principal.  
15 (2) A spouse, a parent, or a descendant of the principal.  
16 (3) A presumptive heir or legatee of the principal.  
17 (4) A person named as a beneficiary to receive any real or personal right upon the  
18 death of the principal.  
19 (5) A trustee or beneficiary of an inter vivos or testamentary trust created by or for  
20 the principal.  
21 (6) A caregiver of the principal.  
22 (7) A person with sufficient interest in the welfare of the principal.

23  
24 B. The petition shall be verified and:

- 25  
26 (1) Name as defendants the principal, the mandatarly, and any other person against  
27 whom relief is sought.  
28 (2) State with particularity:  
29 a. The facts establishing the petitioner's right to bring this action.  
30 b. The reasons that a review of the acts of the mandatarly is needed.  
31 c. The relief sought.

32  
33 C. The principal shall be personally served with the citation and petition. Service on  
34 the principal through a mandatarly shall not be effective service.

35  
36 D. This action shall be filed in the parish where the principal is domiciled, where the  
37 principal resides if without a domicile in this state, or where the principal is physically present or  
38 where immovable property of the principal is located if the principal is without either a domicile  
39 or a residence in this state.

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Comments – 2014

(a) Given that 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. It has no impact on the authority a principal has under 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.

(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 this action because they have authority to bring similar 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 Program Integrity Law).

(d) As Civil Code Article 2988 instructs, this action may be brought against a representative with respect to a procuration. See § 3856.

(e) The principal is named as a defendant and is personally served with the petition and citation to ensure the principal has actual notice of the action.

(f) The petitioner may name a person other than the mandatary and the principal as a defendant, and must provide a detailed explanation of the objectionable acts and the reasons for the objection.

(g) This Section requires a heightened pleading standard and a verified petition to discourage plaintiffs from filing frivolous suits. In addition, the prevailing party may be awarded costs and attorney fees. See § 3855.

(h) Subsection D addresses venue only and does not intend to create personal jurisdiction over any defendant.

(i) An action under this Chapter shall be by ordinary process, but the use of summary proceedings is available.

(j) Section 3854 (D) permits a court to order injunctive relief without the necessity of showing irreparable injury.



1 § 3852. Dismissal upon motion to dismiss filed by the principal

2 If the principal files a motion to dismiss this action:

3 (1) The principal shall testify in person at the hearing on the motion or, by agreement  
4 of the parties or for good cause shown, by visual remote technology or by deposition.

5 (2) The court shall grant the motion to dismiss if it finds that the principal is able to  
6 comprehend generally the nature and consequences of the acts of the mandatary, and the  
7 mandatary's authority to act is not the result of fraud, duress, or undue influence.

8 Comments-2014

9 (a) A principal may choose to file a motion to dismiss the litigation. Before ruling on  
10 the principal's motion to dismiss, the court must hold a hearing to determine whether the  
11 principal is aware of the acts of the mandatary and not subject to fraud, duress, or undue  
12 influence, is able to comprehend generally the nature and consequences of the acts of the  
13 mandatary, and appears able to make reasoned decisions.

14 (b) When a principal is aware of the acts of the mandatary, and is not subject to fraud,  
15 duress, or undue influence, and is able to comprehend generally the nature and  
16 consequences of the acts of the mandatary, the court shall grant the principal's motion to  
17 dismiss.

18 (c) The principal must be present in person at the hearing to allow the court to make  
19 the determinations described in this Section. The parties may agree to, or the court may order,  
20 remote testimony. The standard, in Paragraph 1, for permitting a principal to be absent from the  
21 proceeding, for good cause shown, is a lower standard than is required by Code of Civil  
22 Procedure Article 1633.1, which allows testimony by visual remote technology under compelling  
23 circumstances. This lower standard allows greater use of remote testimony in an appropriate  
24 case.  
25

1 §3853. Substitution

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

4 Comments - 2014

5 (a) The principal's death terminates the mandate. This Section permits the principal's  
6 legal successor to be substituted for the petitioner in this litigation. The legal successor may then  
7 elect to continue or to dismiss the suit. Conflicts of interest may arise when the succession  
8 representative is also the defendant in this action. Under existing law, presumptive heirs and  
9 legatees may challenge the appointment of a succession representative they deem to be unfit, or  
10 bring an action against a succession representative.

11 (b) Full interdiction also terminates the mandate. A court may terminate a mandate in  
12 a limited interdiction by placing the property subject to the mandate under the authority of a  
13 curator. A curator, once qualified, can be substituted for the petitioner or can dismiss the suit.  
14 Temporary or preliminary interdictions have no effect on this action; the action remains available  
15 during a temporary or preliminary interdiction.

16 (c) Allowing substitution avoids res judicata issues. The existing litigation continues  
17 with the new parties. Where prescription was interrupted by a filing under this Chapter that  
18 interruption continues.

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21 §3854. Relief

22 A. If the court finds that a mandatary has violated a duty or failed to perform any  
23 obligation as a mandatary, the court may:

- 24 (1) Grant any relief to which the principal is entitled.  
25 (2) Enjoin a mandatary from exercising all or some of the powers granted by the  
26 mandate.

27 B. While the action is pending, the court may:

- 28 (1) Order an accounting from a mandatary.  
29 (2) Order, without first holding a contradictory hearing, a financial institution, a  
30 health care provider, or any other person to provide the financial, medical, or other information  
31 of any defendant to the action.  
32 (3) Appoint a qualified person to investigate the allegations in the petition and to  
33 report the findings.  
34 (4) On its own motion order other appropriate discovery.  
35 (5) Enjoin a mandatary from exercising all or some of the powers granted by the  
36 mandate.  
37 (6) Appoint a person to exercise some or all of the authority granted by the mandate,  
38 including authority to perform routine financial transactions and to make health care decisions, if

1 there is no successor or substitute mandatory named in the mandate who is able or willing to  
2 serve, or if no law otherwise provides a person to act.

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

- 5 (1) The express wishes of the principal.
- 6 (2) The known or reasonable expectations of the principal.
- 7 (3) The best interests of the principal.
- 8 (4) Any will, trust, or beneficiary designation executed by the principal.
- 9 (5) The principal's history or pattern of donations inter vivos.
- 10 (6) Physical, financial, or psychological abuse of the principal.
- 11 (7) Fraud, duress, or undue influence.
- 12 (8) The principal's regular contact with family and friends other than a mandatory.
- 13 (9) The ability of the principal to comprehend generally the nature and consequences  
14 of the acts of a mandatory.
- 15 (10) The donee's knowledge or imputed knowledge that a donation was not for the  
16 benefit or gratification of the principal.
- 17 (11) The good or bad faith of a defendant.

18 D. Unauthorized acts by or with the consent of a mandatory are subject to injunctive  
19 relief without the necessity of showing irreparable injury.

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22  
23 Comments – 2014

24 (a) This action allows a person other than the principal to ask for court review of the  
25 acts of a mandatory. It does not create new standards of behavior for the mandatory. After a  
26 hearing, a court can order any relief to which the principal is entitled had the principal brought  
27 the claim against the mandatory.

28 (b) A court may take actions normally reserved to the principal such as terminating  
29 some or all of the authority granted by the mandate or collecting funds due to the principal. If a  
30 court enjoins a mandatory from acting, this Section authorizes the court to appoint a person to  
31 handle the principal's affairs pending disposition of the litigation. A principal apparently unable  
32 to make reasoned decisions may also be unable to name a new mandatory.

33 (c) This Section expressly authorizes the court to gather information from financial  
34 institutions and health care providers, and to appoint an investigator. Revised Statutes 13:3715.1  
35 permits a court to issue an order for the production of a patient's records, but only after a  
36 contradictory hearing. This Section, however, allows the court to obtain medical records without  
37 a contradictory hearing. A court order to provide financial records under this Section is not  
38 subject to the requirements of R.S. 6:333.

39 (d) The list of factors for the court to consider offers guidance. It is illustrative, and  
40 not exhaustive.

41 (e) An action under this Chapter shall be by ordinary process, but summary  
42 proceedings are available. Code of Civil Procedure Article 3601 allows a court to issue an  
43 injunction, "where irreparable injury, loss, or damage may otherwise result to the applicant . . .".

1 Subsection (D) permits a court to order injunctive relief without the necessity of showing  
2 irreparable injury.

3

4 § 3855. Payment of costs and attorney fees

5 The court may render judgment for costs and attorney fees, or any part thereof, against  
6 any party. No costs or attorney fees shall be awarded to a petitioner when the petition is  
7 dismissed on the merits.

8 Comments – 2014

9 (a) Court costs and attorney fees are allowed to discourage frivolous suits, or to  
10 reimburse the petitioner who initiates this action to benefit the principal.

11 (b) The principal may be responsible for reimbursing the mandatory for expenses  
12 incurred in carrying out the mandate, as provided in Civil Code Article 3013.

13

14 §3856. Applicability

15 A. This Chapter applies to a procuration and a representative in the same manner as  
16 it applies to a mandate and a mandatory respectively to allow an action against a representative  
17 for violating any duty or failing to fulfill any obligation in the procuration.

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

20 Comments – 2014

21 (a) Civil Code Article 2988 subjects a procuration to the rules governing mandate.

22

23 (b) This Chapter creates a new right of action to protect the interests of a principal  
24 when a mandatory is no longer prudently fulfilling the mandate. This protection may not be  
25 appropriate for all mandates. This Section excludes from this protection a mandate intended to  
26 benefit the mandatory or a third person when the principal agrees that the mandate is irrevocable  
27 and when the law allows the mandate to be irrevocable.

28 (c) Civil Code Article 3025 governs when the parties may agree to make a mandate  
29 irrevocable. The most common occasion for irrevocability involves creditors who require an  
30 irrevocable mandate in case a debtor defaults. The "third party" identified in Civil Code Article  
31 3025 could be a creditor.

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R.S. 6:311.1. 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~~ that 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) (2) For the purposes of this Section, "written notice" shall mean a court order or other writing addressed to the federally insured financial institution indicating that the principal power of attorney, procuration, or mandate has been revoked, modified, or terminated, the authority of the agent, or indicating that one of the events of termination as specified in including a termination pursuant to Civil Code Article 3024 has occurred.~~

B. A federally insured financial institution shall not be liable for transactions or activity by an agent ~~occurring~~ that occur prior to the receipt of written notice and a reasonable opportunity to act on it.

§333. Disclosure of financial records; reimbursement of costs

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B. Notwithstanding any other provision of law to the contrary, except R.S. 9:151 et seq., R.S. 9:3854(B)(2), R.S. 13:3921 et seq., Code of Civil Procedure Article 2411 et seq., R.S. 46:236.1.4, and R.S. 47:1676(D)(2) and 1677, no bank or its affiliate shall disclose any financial records to any person other than the customer to whom the financial records pertain, unless such financial records are disclosed:

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1 Civil Code Art. 3029. Termination by the mandatary

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

8 Source for revisions: UPOAA. § 118.

9 Comment - 2014

10 The duty of the mandatary to notify someone other than the principal when the mandatary  
11 believes the principal lacks capacity does not impose a duty on the person notified to accept any  
12 responsibility or to take any action. The mandatary remains responsible for the consequences of  
13 his failure to fulfill the mandate until proper notice is given.  
14