LEGAL STATUS IN LOUISIANA

A GUIDE TO:

FULL INTERDICTION
LIMITED INTERDICTION
CONTINUING TUTORSHIP
REPRESENTATION & MANDATE
(formerly Power of Attorney)
REPRESENTATIVE PAYMENT

Legal Procedures
And Practical Results

ADVOCACY CENTER

LEGAL STATUS
IN
LOUISIANA

© 1995, Revised 2001, 2006, 2008, 2011, 2013 and, 2017 by the Advocacy Center
This guide may be reproduced without written permission of the Advocacy Center, provided the source is credited.

The Advocacy Center
8325 Oak Street
New Orleans, LA 70118
800-960-7705
Fax: 504-522-5507
www.advocacyla.org

PREFACE

The Advocacy Center (AC) is a private, non-profit corporation designated by the Governor as Louisiana's protection and advocacy agency for persons with developmental disabilities, severe disabilities, mental illness and for beneficiaries of the U.S. Social Security Administration; and as the Client Assistance Program for clients of the Louisiana Division of Rehabilitation Services. AC provides legal services to persons aged sixty and older in several parishes in Louisiana. Under a contract with the Governor's Office of Elderly Affairs, AC also provides ombudsman and legal services to nursing home residents; and, under a contracts with the Louisiana Attorney General's office, provides Ombudsman services to persons residing in community homes and legal and advocacy support to individuals receiving Medicaid waiver services through the Office of Aging and Adult Services and Office of Citizens with Developmental Disabilities.

Each year the AC receives many requests for information and assistance regarding elderly individuals and/or individuals with disabilities who are unable to care for themselves. The sheer number of such requests convinced us of the need for this guide. Inquiries come from individuals regarding a parent who can no longer take care of himself or his finances, and from parents of mentally or physically impaired children who realize the need to plan for the child's future care. AC also answers questions from individuals who are competent, but want to make provisions for their care should they become incapable or incompetent. AC also encounters situations where people with disabilities who are legally competent are not being afforded their full range of rights as a competent major, because other individuals in their lives may not understand that the person with a disability retains the legal right to make his or her own decisions unless a court of law has determined otherwise.

This guide explains the methods by which a person's legal status can be changed. A person's *legal status* is that person's standing in the eyes of the law. A person's legal status is either "competent" or "incompetent"; that is, the person is

determined capable or incapable of making his own decisions regarding personal finances, medical treatment or any other decision affecting that person. If a person is unable to care for himself, the law provides methods to change that person's legal status to permit another individual to make the important decisions regarding his care.

This guide presents situations in which a change of legal status might be beneficial, and also presents situations in which it may not be a good option. Whether you have a parent with diminished mental capacity who is no longer able to take care of himself, or you need to maintain the parental control over decision-making for your child, or you wish to plan for your own future care and management, this guide describes the legal options available.

Although all of the words which may be unfamiliar to you are explained in the text, you will also find a glossary at the end of the text. The legal source books where specific laws may be found are documented at the beginning of the text for the appropriate section. The books referenced in this publication may be found in the Louisiana Law section of any law library.

While this publication deals with legal issues, it is not a substitute for legal advice.

We hope this guide will answer many of the questions you have and provide a starting point for obtaining additional information.

Note:
For clarity of the discussion, masculine pronouns have been used throughout this publication and are meant to be inclusive of both genders. This is done simply to avoid the repetitive and confusing use of "his or her." The same rules apply regardless of gender.

TABLE OF CONTENTS

Page

CHAPTER 1: LEGAL STATUS 9

1.1 AN OVERVIEW OF LEGAL STATUS 9

1.2 PRACTICAL REASONS WHY A CHANGE IN LEGAL STATUS MAY BE NEEDED 10

CHAPTER 2: INTERDICTION 12

2.1 LEGAL CONSEQUENCES AND EFFECTS OF INTERDICTION 12
What rights are lost by a person who is interdicted?

2.2 LIMITED INTERDICTION: AN ALTERNATIVE TO FULL INTERDICTION 14

2.3 INTERDICTION / LIMITED INTERDICTION: PRACTICE AND PROCEDURE 14
Who is a proper subject of an interdiction proceeding?
Who can obtain the interdiction of another?
Where does one file a petition for interdiction?
Who pays for the cost of interdiction?
How does the defendant learn that a petition for interdiction has been filed?
How does the defendant respond?
Does an interdiction proceeding require a hearing in court?
What happens at the hearing?
How is a curator appointed by the court?
What requirements must a curator fulfill?
What is the role of the curator?
What is the role of the undercurator?
When can a curator be removed?
What if either party disagrees with the judgment of the court?
What is the responsibility of the curator and undercurator for the acts of the interdict?

CHAPTER 3: CONTINUING TUTORSHIP 24

3.1 LEGAL CONSEQUENCES AND EFFECTS 24
What rights are affected by a continuing tutorship?
3.2 PRACTICE AND PROCEDURE 26
Who is a proper subject of a continuing tutorship?
Who can obtain continuing tutorship over another?
Where does one file a petition for continuing tutorship?
Who pays for the cost of a continuing tutorship?
How does the subject of a continuing tutorship learn that a petition has been filed?
What happens after the petition is filed?
How are tutors and undertutors appointed by the court?
What are the prerequisites to becoming a tutor and undertutor?
What is the role of the tutor?
What is the role of the undertutor?
Can the decree granting the continuing tutorship be contested?

CHAPTER 4: REPRESENTATION AND MANDATE formerly "POWER OF ATTORNEY" 30

4.1 PROCEDURES AND EFFECTS 30
Who may grant a power of attorney?
Who may receive a power of attorney?
How is a power of attorney granted?
Are there different types of power of attorney?
What are the obligations of the agent?
What are the obligations of the principal?
Does the power of attorney continue if the principal becomes incapacitated?
How will other people know the power of attorney has been granted?
Can the power of attorney be revoked?
Are there other ways in which the power of attorney can be terminated?
Will the principal's Social Security checks be sent to the agent?

What else may a power of attorney include?

CHAPTER 5: REPRESENTATIVE PAYMENT 37

5.1 PROCEDURES AND EFFECTS 37
What conditions lead to representative payment?
What information is considered by SSA?
How is a representative payee selected?
How does the beneficiary learn of the representative payment decision?
What if the beneficiary objects to the representative payment decision?
What are the responsibilities of the representative payee?
What if the representative payee misuses the money?
When would a new representative payee be selected?
When will representative payment be terminated?

CONCLUSION 43

GLOSSARY 44

LIST OF RESOURCES 47

CHAPTER 1: LEGAL STATUS

1.1 An Overview of Legal Status

The legal term competency refers to the ability of an individual to manage his own affairs. A person is competent if able to make personal, financial, medical and other important decisions. Louisiana law provides that individuals eighteen years of age or older are competent and capable of governing themselves. In other words, an adult is automatically legally competent unless a court of law has determined otherwise.

Until the age of eighteen, an individual in Louisiana is considered a minor and is presumed to be incompetent. This means that a minor, unless otherwise authorized by a court through emancipation, cannot manage his own affairs and must rely on a parent or tutor to exercise decision-making authority. Once an individual reaches the age of eighteen, he is considered to be of the age of majority, is presumed to be competent under the law, and is permitted by law to act on his own behalf.

This presumption of competency provided by the law is enjoyed by every adult who is eighteen years of age or older, unless a court has declared him to be incompetent. This is true for individuals with intellectual disabilities or cognitive impairments, mental illness, or any other type of disability, as well as for those who do not have such impairments. Thus, upon reaching the age of majority (age eighteen) a person with an intellectual disability is considered legally able to manage his own affairs, whether or not actually capable of doing so.

The result of this presumption of competence is that a parent loses the legal authority to manage his child's affairs once the child becomes an adult at eighteen years of age. Even if the child has a disability and still needs the assistance of his family in order to survive, the law will recognize the individual as a competent adult. Unless the legal status of the individual with a disability is altered by the court, only he has the right to manage his own affairs, consent to his own medical treatment, and make decisions about any facet of everyday life.

This is equally true for an elderly person who becomes incapacitated by illness and can no longer adequately care for himself or his property. Family and friends have no legal authority to act on behalf of the elderly individual unless they have been granted that authority by a court (through interdiction), by the elderly individual (through procuration or mandate), by the Social Security Administration (through representative payment), or by state law.

In order to obtain the legal authority to act on behalf of another person when the person is not competent to grant the authority, one may request that the state court transfer decision-making authority by an interdiction, limited interdiction or

continuing tutorship. There is also provision in state law for a competent adult to voluntarily transfer to another person authority for certain types of decisions, through a procuration or mandate. Federal regulations of the Social Security Administration (SSA) provide that benefits may be paid to, and managed by, a representative payee on behalf of the beneficiary; the representative payee may be appointed at the beneficiary's request or, if the SSA determines that the beneficiary cannot manage the payments, without the beneficiary's consent.

1.2 Practical Reasons Why a Change in Legal Status May be Needed

A need for change in the legal status of an adult arises when that adult, for whatever reason, is unable to make his own decisions and someone who is capable needs legal authority to make decisions on behalf of the incapacitated person. The point of legally transferring such decision-making authority is to ensure that decisions made on behalf of an incapacitated person are in the best interests of that person.

As discussed in the previous section, a change in legal status may be needed for a person who has severe intellectual disabilities, has never had an ability to make decisions, and has attained the age of majority. In this case, the parent of the mentally impaired individual would ask to maintain decision-making authority although the individual is eighteen years of age.

A change in legal status may be needed for a person who was previously able to make his own decisions, but lost that ability due to severe mental illness, brain injury, or a medical condition that has adversely affected mental ability. In some instances, an individual may have a medical condition, perhaps one associated with aging, which results in recurring periods of inability for decision-making.

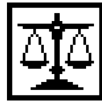
In each case, when an individual is determined to be incompetent by the court, someone other than the individual himself must decide such questions as whether recommended medical treatment should be given; whether other kinds of treatment should be given; how any income should be used; where the person should reside; or who will provide care-taking services.

For any of the situations just described, there may be parents or other family members who are able and willing to make decisions for the individual; or there may be no relatives willing to assume such responsibility. In some situations the individual lives in an institution, has no family, and institutional staff make decisions for the person. But relatives and professional caregivers have no legal authority to make decisions for an adult who, regardless of actual capacities, is presumed competent by law.

Because the loss of authority over one's own decisions is such a tremendous

loss, legal status laws also provide protections for those who are believed to be incompetent. Before an individual can be deprived of the right to control his own life through interdiction, a court hearing must be held to determine whether the individual is, in fact, unable to make decisions. An adult whose competency is in question must be represented by an attorney at an interdiction hearing. If the court finds that the person is incompetent to exercise some or all decision-making authority, then the court must decide who is the appropriate person to take on decision-making for the incompetent person. Similar protections exist when a continuing tutorship is sought and the individual is over the age of 18. Court-appointed curators, persons granted representation, and representative payment agents all have legal obligations to act in the best interests of the person for whom they make decisions.

Should your situation call for an interdiction or continuing tutorship, you will need the assistance of an attorney. If you choose to use a procuration or mandate to grant authority for certain decisions to someone else, you should also consult an attorney. If you decide that representative payment is needed for yourself or someone else, you will need to contact the Social Security Administration.

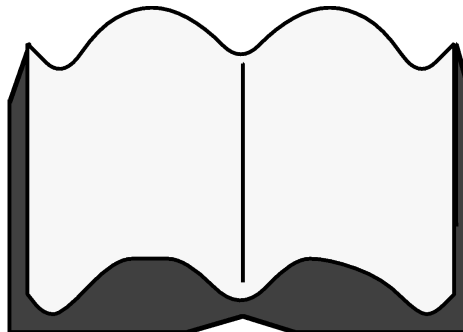


CHAPTER 2: INTERDICTION

2.1 Legal Consequences and Effects of Full Interdiction

Interdiction is probably the best-known procedure for altering the legal status of a mentally impaired or elderly individual and has long been used in Louisiana courts. Interdiction is, however, the most intrusive procedure affecting an individual's rights and responsibilities and is often more sweeping in its effect than is actually necessary to meet the needs of the individual. It has been called "a civil death" by the Louisiana Supreme Court, because the interdicted individual, or interdict, is deprived of all civil rights, including the right to make decisions about his own person and property. These rights are then transferred to a person designated by the court. The person who is authorized to act on behalf of the interdict is known as the curator. (If the person is a woman, she is called a curatrix.)

To fully understand the meaning of this reference to civil death, one must understand the actual consequences of an interdiction proceeding in which full interdiction is granted.



The laws generally governing persons incapable of administering their estates, interdiction, and curatorship may be found in Title IX of the Louisiana Civil Code, articles 389 through 426 and Title VI of the Louisiana Code of Civil Procedure, articles 4541 through 4569.

What rights are lost by a person who is fully interdicted?

The Right to Contract. The law clearly indicates that one who is fully interdicted does not have the legal capacity to enter into a contract of any kind. Because virtually every commercial transaction is considered a contract, an interdicted person loses the right to buy, sell, or mortgage real estate or to open a bank account. While an interdicted person may "own" property, he or she cannot sell it, exchange it or use it to buy other goods. All of these rights and responsibilities are transferred to the curator.

The Right to Marry. Under Louisiana law, marriage is considered a civil contract. Lacking the legal capacity to contract, a person who is fully interdicted cannot marry.

The Right to Vote. Both state law and the Louisiana Constitution provide that an individual who is interdicted cannot register to vote nor can he vote. If registered prior to the court determining and issuing a judgment of interdiction, the individual will be notified by the registrar of voters that he cannot vote as long as the judgment of the court remains in effect.

The Right to Accept or Renounce Successions. An interdict cannot accept or renounce an inheritance on his own behalf. These actions must be taken by the curator of the interdict.

The Right to Sue or be Sued. Similarly, a person who is fully interdicted cannot initiate a lawsuit to enforce his own rights, but must rely on a curator to sue someone for him. Moreover, a person who is interdicted cannot be named as a defendant in a lawsuit, except for tort and family law suits.

Another exception is that the interdict retains the capacity to sue in his own name to revoke the interdiction.

Other Rights. An interdict loses the right to drive a motor vehicle, consent to his own medical treatment, leave the state without permission, and engage in most decision-making about his own life.

All of the rights described above are lost by a person who is the subject of a full interdiction **except** the right to seek revocation of the interdiction. While such a broad withdrawal of an individual's rights may be necessary in some circumstances, it is often more appropriate to consider an alternative to full interdiction.

2.2 Limited Interdiction: A Less-Restrictive Alternative to Full Interdiction

Recognizing the severe deprivation of rights that results from a judgment of interdiction, in 1981, the Louisiana legislature enacted a law providing for limited interdiction. This law provides greater flexibility for the court to fashion an effective remedy for an individual who is in need of assistance with some kinds of decision-making, but who is capable of exercising his own judgment in other ways.

A limited interdiction will infringe upon the rights of the interdict only to the extent that his rights cannot be protected by any less restrictive means. While some decision-making authority is transferred to a curator, the interdict retains all other rights not specifically granted to the curator. For example, an adult with moderate mental impairment may need assistance with financial matters, but be otherwise fully capable of taking care of matters not involving money management. Through a limited interdiction, a curator can be given the authority to manage this individual's funds without taking away his right to vote, marry, and make all of those daily decisions of which he is capable.

Similarly, an elderly individual who has developed an infirmity affecting his decision-making may need some assistance with financial matters, but be capable of all other decision-making. Under a limited interdiction, a curator can assist such an individual with his real needs without infringing upon his other basic civil rights.

2.3 Interdiction/Limited Interdiction: Practice and Procedure

The procedures for obtaining an interdiction or limited interdiction are essentially the same. Any differences are noted where appropriate. It is important to understand at the outset that an interdiction proceeding is like any other lawsuit, and requires that all of the formalities specified by law be followed. The person seeking the full or limited interdiction of another is referred to as the petitioner. The individual who is the subject of the proceeding is referred to as the defendant.

Who is a proper subject of an interdiction proceeding?

The law requires that the subject of an interdiction proceeding be at least eighteen years of age or older or an emancipated minor. The law also requires that the individual be unable consistently to make reasoned decisions regarding the care of his person and property, or that he is unable to communicate these decisions in a manner understandable by others. These requirements identify the most important distinction between a full and a limited interdiction. In general, "unable to consistently make reasoned decisions regarding the care of his person" means an inability to make day-to-day personal decisions involving matters such as activities of daily living, health and medical care, and residential placement. The "inability to consistently make reasoned decisions regarding the care of his property" means lacking the competence to manage his financial affairs, personal property and real estate.

In order to fully interdict an individual, the petitioner must prove that the defendant is unable to make his decisions for his person AND for his property. However, to obtain a limited interdiction, the petitioner must prove only that the subject is unable to make decisions regarding his person *or* his property *or any aspect of either*. The dual requirements of proof necessary to obtain a full interdiction set a more difficult standard to meet than the "either-or" standard necessary to obtain a limited interdiction.

To seek an interdiction, the law requires that the inability to care for one's own person or to administer one's own estate must be due to "an infirmity." It is important to understand that the condition of mental illness, intellectual disability, or other incapacity that gives rise to the need for either type of interdiction must be of a very serious nature resulting in a significant impairment of the individual's ability to exercise his own judgment. Chronic substance abuse may qualify as such an infirmity, but advanced age alone does not.

The law makes a separate provision allowing for the interdiction of an individual who cannot take care of his own person or manage his estate due to physical impairment that prevents any kind of communication with others. A defendant who has any means of communicating his desires to others is not a proper subject for an interdiction. If the physically impaired individual's mental faculties are fully intact, there is probably no need for an interdiction, limited or full.

Who can obtain the interdiction of another?

Anyone can seek the interdiction of another person. However, if the petitioner in such an action has not had a significant relationship with the individual prior to the filing of the interdiction, the court will examine the motive of the petitioner to ensure that there are no improper reasons for him seeking legal

control over the defendant's person and estate.

Where does one file a petition for interdiction?

A petition for interdiction is generally filed in civil district court in the parish where the defendant is domiciled. (A domicile is defined as one's true, fixed and permanent home. A person may have more than one residence, but only one domicile.) If the defendant has no domicile within the state, then the petition is filed in the parish where the defendant resides. If an individual neither resides nor is domiciled in the state, that individual may be interdicted in any parish in which he is found. Thus, the petitioner cannot simply file a petition wherever he finds it convenient. If a judgment of interdiction is granted within a specific parish, all subsequent related proceedings must be brought in the parish where the original judgment was entered.

Who pays for the cost of interdiction?

As in any other legal proceeding, there are several costs associated with interdiction. First, there is the cost of the attorney whom the petitioner retains to handle the interdiction. Second, there is a fee to file the petition in the appropriate court. This filing fee may or may not include the sheriff's fee to serve (deliver the petition to) the defendant. The filing fee and sheriff's fee may be waived (not collected) by the court if the petitioner proves he is indigent and, therefore, unable to pay these costs. However, it is not common for a judge to waive these fees for the petitioner.

The third cost is payment of the fee for the attorney who is appointed to represent the defendant. The court will determine this fee at the completion of the case and order that it be paid. The amount of the fee varies depending on the complexity of the case. Other miscellaneous costs that may arise include payments for psychological or medical evaluations or expert witnesses that may be necessary to prove the case.

The court can assign these costs to either party as it sees fit. The petitioner will not get his attorney’s fees paid when judgment is against him, or if the case is dismissed on its merits.

A final "cost" which may arise in an interdiction proceeding is the payment of money damages by the petitioner if he is unsuccessful in obtaining an interdiction and the court determines that he **knew or should have known that the allegations of the defendant’s abilities used to justify an interdiction were false.** This is a seldom-used provision in the law, but the court may order a petitioner to pay these damages to the defendant, as well as all of the costs of the lawsuit. Anyone considering bringing a petition for interdiction should discuss the

actual costs with his attorney so that there will be no surprises as the case proceeds.

How does the defendant learn that a petition for interdiction has been filed?

As in every other type of lawsuit, the defendant in an interdiction proceeding must be served by the sheriff's office with a citation and a copy of the petition that has been filed against him. The sheriff should serve the defendant personally but if the defendant lives out of state, service may be made by anyone over the age of 18. Additionally, all other parties named in the petition (the defendant's spouse, children, parents or other people with an interest in the defendant's well-being) must receive a copy of the petition by certified mail.

How does the defendant respond?

The law requires the defendant to file a timely response or answer to the lawsuit. If able, the defendant should contact an attorney as soon as he receives the petition so that an answer can be filed. The answer is usually a general denial of all of the allegations contained within the petition.

If the defendant does not answer, or if he answers in person, the petitioner must apply for an attorney to be appointed for the defendant. The court *must* appoint an attorney to represent him. A defendant in an interdiction action cannot appear in court without an attorney.

Once appointed to represent the defendant, the attorney must meet with the defendant personally to discuss the case and to review any records that may aid him in preparing the case, unless excused by the court for a good reason. The appointed attorney must then file an answer to the interdiction petition.

Does an interdiction proceeding require a hearing in court?

Interdiction proceedings require a court hearing. Interdiction hearings are "summary proceedings." Summary proceedings are considered so important that they take precedence over other matters on the court's schedule. This means that a hearing should be scheduled without the delays experienced in other types of lawsuits. However, the expedited nature of this proceeding does not mean that the defendant is not entitled to a full trial; he still has the right to request discovery, call witnesses in his defense, cross-examine witnesses against him, and present evidence in his defense. Because it is a summary proceeding, the judge (there is no jury) typically renders a decision at the close of the hearing or within a short time thereafter.

What happens at the hearing?

At the hearing, the petitioner must prove the allegations contained within the petition. This means that the petitioner must prove that the defendant suffers from

some type of infirmity which prevents him from making reasoned decisions regarding the care of his own person and/or property. The petitioner always has the burden of proving the case against the defendant. The proof against the defendant must be clear and convincing.

The defendant has a right to be present at the hearing, and he should not be absent unless there is a good reason. If the defendant cannot come to the courtroom, the judge can hold the hearing where the defendant is. The judge also may require the curator to attend the hearing.

The judge may order that the defendant be examined prior to the hearing by an expert with training or experience in the type of infirmity alleged, such as a psychologist or psychiatrist, who will report under oath his conclusions about the defendant's competence. Either side may present its own expert witnesses, as well. In addition to expert witnesses, the judge may directly question the defendant to determine his capacity. The judge may choose to question the defendant privately, outside of the presence of the petitioner. Either party may call witnesses and cross-examine the witnesses of the other party.

If the judgment of the court is to deny the interdiction, the case is over unless the petitioner decides to question the court's decision by filing an appeal of the judgment to a higher court. However, if the interdiction is granted, or if the judgment for interdiction is confirmed on appeal, the court will appoint a curator and an undercurator in the judgment. The judgment of interdiction or limited interdiction should clearly state those responsibilities that are to be assumed by the person appointed as the interdict's curator. If the interdiction is temporary or preliminary, the judgment also will state the date on which the interdiction will terminate.

How is a curator appointed by the court?

The term curator refers to the individual who is appointed by the court to act on behalf of the interdict. Often, the petitioner in the interdiction will also ask to be appointed curator. However, not all petitioners will be subsequently named as curators. In fact, the law provides that certain persons be given preference to act as curators.

The first preference for curator is anyone the interdict may have previously designated in a signed writing when he or she was of sound mind. Thus, a competent person can designate a person who will become his curator should the need arise for one in the future. This person will be appointed curator unless disqualified by the court.

If the interdict has not previously nominated a curator, then the interdict's spouse is given preference as curator over other relatives or interested parties. After the spouse, an adult child of the defendant has preference, then a parent, then an

individual with whom the defendant has lived for more than six months.

If none of these preferences is applicable to a particular case, the court will appoint the applicant who is best qualified to serve as curator. Such a determination of who is best qualified to act as curator will depend on the individual needs of the interdict. Under no circumstances, however, can any of the following persons be named as curator: (1) a minor; (2) an interdicted person; or (3) a person who is not a resident of the state and who has no resident contact. Only in very rare cases will the court consider (1) a convicted felon; (2) a person who is indebted to the interdict; (3) a person who is an adverse party in a lawsuit in which the interdict is involved; or (4) an owner, operator, or employee of a long-term care facility where the interdict is receiving care, unless that person is a relative of the interdict.

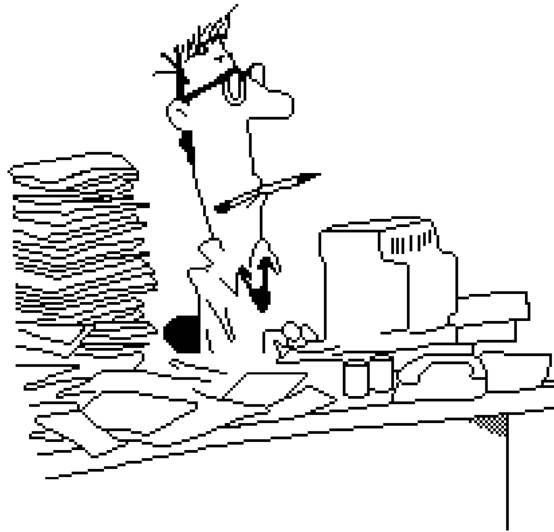
What requirements must a curator fulfill?

In order to act as curator for an interdicted person, an individual must post a bond as security for the faithful performance of his duties. This bond should equal the total value of the interdict's estate, based on an inventory or detailed listing of the interdict's property. The requirement for posting a bond only applies when a curator is given authority over the interdict's estate. If a limited interdiction does not give a curator any authority over the individual's estate, no bond is required.

Additionally, a curator must take and sign an oath that he will perform his duties faithfully. Once the bond (if required) and the oath are submitted to the court, the clerk will issue letters of curatorship to the curator within 10 days as proof of his authority to act on behalf of the interdict. The letter will also state the specific powers entrusted in the curator and an expiration date for the curatorship, if applicable.

What is the role of the curator?

The extent of the duties and authority of a curator will depend on the judgment that is issued by the court. If a full interdiction is granted, the curator will be responsible for making all personal decisions for the interdict such as where he will live, work, go to school, etc. The curator will also have the authority to consent to medical treatment for the interdict, although consent to procedures affecting the interdict’s reproductive abilities requires court authorization. There are also protections regarding admitting the interdict to mental health facilities or long term care facilities. The law dictates that an interdict cannot be removed from the state without court approval, so a curator will have to seek approval if such a move is contemplated. Any lawsuits that the interdict may wish to bring must be brought by the curator on behalf of the interdict.



In addition, under a judgment of full interdiction, a curator must administer the estate of the interdict and manage all of the interdict's finances. Any money or other assets that the interdict may own must be used solely for his own needs and *cannot* be used for the curator's needs. In order to ensure that the curator has appropriately used the interdict's resources, the court requires the curator to file an accounting that clearly reflects the assets, income and expenses of the interdict, as well as the interdict’s location and condition, with the court once a year, at the termination of the curatorship, and at any other time the court requests. Consequently, the curator must keep detailed records of income, resources and expenses, so that this accounting can be prepared and filed with the court.

In a limited interdiction, the judgment should specifically list the duties and responsibilities that the curator is authorized to assume. It may be as limited as allowing the curator to consent to medical treatment or it may authorize the curator to manage only certain portions of an individual's estate (i.e. property) and leave the management of the limited interdict's annual income from wages to himself. All authority not specifically granted to the curator is retained by the interdict.

Most importantly, in both full and limited interdictions the curator should consider the desires of the interdict as expressed both before and after the interdiction, as well as his religious beliefs or other factors that would indicate his wishes. The curator should involve the interdict to the greatest extent possible in all decision-making, and he should encourage the interdict’s independence.

There are two other important aspects relating to curators that must be pointed out. First, the law provides for the establishment of temporary and preliminary interdictions when a petition for an interdiction is pending, there is a substantial likelihood for the interdiction to succeed, and there is a potential for imminent substantial harm to the interdict unless a curator is appointed.

A temporary interdiction lasts ten days and at the request of the defendant or

for “extraordinary reasons” one ten-day extension can be allowed. For a temporary interdiction to be granted, there must be an immediate threat of irreparable injury, loss, or damage before the interdiction hearing can be held. A temporary interdiction may be granted without a hearing if the evidence presented convinces the court that such a severe action is necessary to protect the interests of the defendant. As protection for the defendant, in the same order granting the temporary interdiction, a preliminary interdiction hearing must be scheduled within ten days.

A preliminary interdiction requires a hearing at which the defendant can defend himself, which must take place within twenty days of the order that schedules it. The preliminary interdiction can last thirty days, and can be extended for good cause for no more than thirty additional days.

The second noteworthy provision is that in exceptional cases, the law allows a court to appoint two curators to care for the interdict. A court may wish to appoint one curator to care for the interdict and to make personal decisions for him, and another curator to manage the interdict's estate. The appointment of two curators would only take place if necessary to ensure that both personal decision-making and financial management are adequately addressed.

What is the role of the undercurator?

In addition to a curator, every interdict must have an undercurator. The major role of the undercurator is to watch over the curator and ensure that the curator is fully and responsibly carrying out his duties to the interdict. The undercurator has access to any information needed to ensure that the best interests of the interdict are being protected. The undercurator fulfills his responsibility by bringing the issue in question to the attention of the court.

The undercurator does not assume the duties of the curator if the curator dies or is otherwise relieved of his duties. In such situations, it is the duty of the undercurator to inform the court of the necessity of appointing a new curator, and to suggest a suitable successor. Like the curator, the undercurator must sign an oath promising to faithfully carry out his duties. However, the undercurator is not required to post a bond.

When can a curator be removed?

Any interested party may petition the court for the removal of a curator if he can clearly show that neither the curator nor the undercurator is adequately performing his duties. The court on its own may recommend removal of the curator if it appears that removal is in the best interest of the interdict.

In order to make such a decision, the court will look at the following factors: (1) whether the curator has been grossly negligent or has intentionally embezzled

any of the interdict's property; (2) whether the curator has failed to submit an accounting of the interdict's property; (3) whether the curator has failed to obey any order of the court with respect to performing his duties as a curator; (4) whether there is proof of gross misconduct or mismanagement in the performance of the curator's duties; (5) whether the curator is himself incompetent or is incarcerated or in any way incapable of performing his court-appointed duties; (6) whether there is evidence that the curator is abusing the interdict (physically or otherwise) or failing to educate the interdict or failing to provide the interdict with as much independence as possible considering the means of the interdict's estate.

When the court removes a curator for any of the reasons stated above, the court may appoint as a curator a spouse or relative of the interdict, an interested party, or an appropriate nonprofit organization.

What if either party disagrees with the judgment of the court?

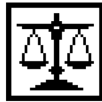
A judgment to grant or deny a full or limited interdiction may be appealed by either the petitioner or the defendant. The appointment or removal of a curator can also be appealed, as can a modification or termination of the interdiction. This appeal must be filed within thirty days from the date of the judgment, or the right to appeal will be lost. The court of appeal will then review the transcript of the interdiction hearing, may hear new evidence, or may personally question the interdict. The court of appeal can agree with and uphold the decision of the lower court, or it can disagree with and overturn the judgment of the lower court.

An individual may not choose to or be able to appeal his judgment of interdiction initially, but may wish to challenge his interdicted status years later. This can be done by filing a petition for revocation of the interdiction. The interdict has the right to sue for revocation of the interdiction in his own name.

In a revocation hearing, the court will determine whether the conditions that proved the need for the interdiction have ceased to exist, and whether the interdict is now capable of exercising his own rights and making his own decisions. The interdict cannot resume the exercise of these rights until a judgment of revocation is issued by the court.

What is the responsibility of the curator and undercurator for the acts of the interdict?

Although the curator is not responsible for an interdict's torts solely by reason of the relationship, the curator may be liable for damages resulting from his own acts or omissions. For example, if a curator negligently supervises an interdict in his charge and, as a result, the interdict causes damages to himself or to a third party, the curator may be personally responsible for the resulting damages.



CHAPTER 3: CONTINUING TUTORSHIP

3.1 Legal Consequences and Effects

A continuing tutorship, like an interdiction, is a proceeding through which certain decision-making authority over an individual is granted to another. To understand fully the concept of a continuing tutorship, one should be familiar with the role of a tutor in Louisiana law.

A tutor is a person who is legally responsible for the care of a minor child under the age of eighteen. For example, the law recognizes a parent as the natural tutor of his own child. While a child is under the age of eighteen, all decision-making authority and legal responsibility rest with the minor's tutor. This is because minors carry a presumption of incompetency under the law. Once eighteen, however, the individual becomes legally responsible for himself and the parent or tutor has no legal authority to act for the eighteen year-old. However, if a continuing tutorship has been granted, then the parent or tutor maintains the legal authority to act for the individual. An individual who is subject to the continuing tutorship retains the status of a minor regardless of his age.

Continuing tutorships are often referred to as permanent tutorships. While the tutorship of a parent normally would end when a child becomes eighteen, through this legal procedure, the tutorship becomes permanent or remains in effect until it is formally revoked by a court.

A continuing tutorship may be obtained for someone who is between the ages of fifteen and eighteen. In that instance, there is very little change in the individual's legal capacity since a tutor has all decision-making authority over a minor anyway. When an individual under a continuing tutorship turns eighteen, however, the parent or tutor maintains legal authority to act for the individual. His legal capacity becomes that of a *minor who has been granted the rights of administration*.

The laws generally governing emancipation, tutorship, and mentally impaired persons may be found in Title VIII of the Louisiana Civil Code, articles 354 through 371; and in Title VI of the Louisiana Code of Civil Procedure, articles 3991 through 4521.

GOOD NEWS AND BAD NEWS

The good news is that an individual subject to a continuing tutorship retains some rights. The bad news is that, due to the revamping of the continuing tutorship laws in 2008, those rights are no longer clearly defined. State law references statutes that define what the rights of administration are, but unfortunately, that section of the law is missing.

What does this mean for an individual operating under a continuing tutorship?

No one is certain, as this has not been challenged in court.

What rights are affected by a continuing tutorship?

Based on law prior to 2008:

<u>The right to contract.</u> The law limits the ability of an individual who is subject to a continuing tutorship to enter into contracts. Such an individual cannot contract for any amount that exceeds his annual income. This means that someone under a continuing tutorship cannot buy real estate or sell or mortgage any property he may own without the tutor's permission and the court's authorization. Once eighteen, a person under a continuing tutorship is said to have the legal capacity of a minor who has been granted emancipation conferring the power of administration. This means that the individual can give leases and receive rents on any property he may own.

<u>The right to marry.</u> A person subject to a continuing tutorship is not totally barred from marrying, however, he must obtain the permission of the tutor before marrying.

<u>The right to vote.</u> The law is silent regarding this right for an individual who is subject to a continuing tutorship. There is no indication that individuals under a continuing tutorship lose the right to vote.

<u>The right to sue or be sued.</u> An individual who is under a continuing tutorship cannot appear in court on his own behalf and must rely on the tutor to represent his interests in all legal actions.

<u>The right to consent.</u> The law grants specific authority to tutors to consent to medical treatment and educational plans for an individual under a continuing tutorship. Thus, the individual loses the right to consent on his own behalf. Additionally, the tutor has the right to obtain any medical, educational or other records relating to the individual, which may result in the loss of the individual's right to confidentiality.

The legal effect of a continuing tutorship on an individual's rights is less severe than the effect of a full interdiction. The utility of a continuing tutorship, however, has been diminished with the passage of the limited interdiction law in 1981. The advantages of a continuing tutorship are questionable when compared to the flexibility of the limited interdiction.

3.2 Practice and Procedure

The procedures for obtaining a continuing tutorship differ depending on the age of the individual who is the subject of the action. When the individual is eighteen years of age or older, the procedures to follow for a continuing tutorship are the same as for interdictions. When the individual is between the ages of fifteen and eighteen, the courts follow the same procedures as those used in any tutorship proceeding. The following is a step-by-step explanation of the legal requirements for obtaining a continuing tutorship.

Who is a proper subject of a continuing tutorship?

The law requires that anyone who is the subject of a continuing tutorship proceeding must be over the age of fifteen. In addition, the individual must possess less than two-thirds of the average mental ability of a person of the same age with normal intelligence. This means that the individual must have an approximate IQ score of less than 67. A determination of the individual's actual mental ability must be made by a diagnostic evaluation conducted by an appropriate professional, such as a psychologist, and must be based on standard, accepted testing procedures.

One can see two important differences between interdiction (full or limited) and continuing tutorship. Unlike interdiction, continuing tutorship can be obtained before an individual reaches the age of majority and *only* applies to individuals with intellectual disabilities. Severe physical disability or mental illness of a child or adult is insufficient to warrant a continuing tutorship.

Who can obtain continuing tutorship over another?

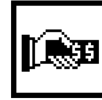
The parents of a mentally impaired individual are usually the parties that are entitled to seek the continuing tutorship of their child. If the parents are a married couple, the court will generally name one parent as the tutor and the other as the undertutor, unless there is good reason not to do so.

If the parents are deceased, incapacitated or absent, any person who would be entitled to custody of the individual can petition the court to be named tutor.

Where does one file a petition for continuing tutorship?

The petition in this action must be entitled "Continuing Tutorship of John

Doe, a Mentally Retarded Person," and may be filed in civil district court in the parish in which the minor is domiciled or the parish in which the parents are domiciled.

Who pays for the cost of a continuing tutorship? 

Unlike interdiction, the law is silent regarding who is responsible for the costs of a continuing tutorship. It is more than likely that the petitioner will pay for his own attorney as well as the filing fees and service costs. Because an individual between ages fifteen and eighteen need not be represented by an attorney, there will be no second attorney's fee as in interdiction proceedings. However, when the subject is eighteen years of age or older, the law requires that the court appoint an attorney to represent him and the petitioner may have to pay the costs of the defendant's attorney as well.

How does the subject of a continuing tutorship learn that a petition has been filed?

Defendants eighteen years of age or older will be personally served with a copy of the petition by the sheriff's office, or the petition may be left with an adult at the place where the defendant currently resides. The law is silent regarding whether a copy of the petition is to be served on defendants who are between the ages of fifteen and eighteen.

What happens after the petition is filed?

As previously explained, all formalities relative to interdiction proceedings must be followed if a defendant in a continuing tutorship action is eighteen years of age or older. This means that the defendant is entitled to legal representation, to be present at the hearing, and to call and cross-examine witnesses.

For children between the ages of fifteen and eighteen, however, such formalities are not required as the child has not yet attained a status of legal competency. At a continuing tutorship hearing for a minor, the petitioners need only establish that the defendant possesses less than two-thirds of the average mental ability of a non-impaired person of the same age.

How are tutors and undertutors appointed by the court?

The petition that is originally filed with the court typically includes a request that the petitioner be named as the tutor. In most cases, both parents will petition the court for the continuing tutorship and will request that they be named as tutor and undertutor. If one or both parents are deceased, absent, or otherwise disinterested in assuming this responsibility, the court can name other relatives or interested parties to the position of tutor or undertutor. Anyone who is named by

the court as a tutor or undertutor must be at least eighteen years of age and of good moral character. He cannot be interdicted, convicted of a felony, or indebted to the defendant. Nor can he be an adverse party in any lawsuit in which the defendant is a party.

What are the prerequisites to becoming a tutor and undertutor?

Once the court determines that certain individuals are appropriate to be named as tutor and undertutor, each must take an oath that he will discharge faithfully the duties of his position. In some cases, a tutor may be required to obtain an inventory or detailed listing of the defendant's property and may be required to post a bond or furnish security in an amount equal to the value of the defendant's estate. Whether the inventory and bond will be required of the tutor depends on the nature of the defendant's estate and the relationship of the parties. The petitioner should discuss all of these possibilities with his attorney before initiating the action.

Upon completion of these prerequisites, letters of tutorship and undertutorship will be issued to provide evidence of the appointment and the parties' authority to act within their respective roles.

What is the role of the tutor?

The tutor has custody of and cares for the minor. It is the tutor's responsibility to make sure that the minor is properly reared and educated. Once the continuing tutorship is granted, the tutor has authority to maintain custody of and manage the estate of the defendant. With regard to the financial affairs of the defendant, the tutor must act as a prudent administrator. The tutor is personally responsible for damages resulting from failure to act as a prudent administrator. The tutor is required to keep an accounting and submit an annual statement to the court regarding the defendant's estate.

The tutor is also responsible for providing consent for medical treatment and any education plans that are developed for the defendant. The law regarding continuing tutorship specifically recognizes the right of the tutor to obtain copies of any medical, educational or other records that may assist him in making decisions for the individual. The tutor must record the decree granting the continuing tutorship in the parish of the minor's domicile.

The court may allow the tutor reasonable compensation for his services, annually, in an amount not to exceed ten percent of the annual revenues of the minor's property.

What is the role of the undertutor?

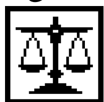
Like the undercurator in an interdiction proceeding, an undertutor stands as an intermediary between the tutor and the defendant. The undertutor has the express duty to offer his concurrence or nonconcurrence when the tutor seeks to make major financial decisions for the defendant. This opinion of the undertutor must be expressed to the court whenever the tutor files the appropriate petition seeking to take a particular financial action.

The role of the undertutor has been compared to that of a watchdog in that he must monitor the tutor's actions and inform the court whenever the tutor fails to act or acts improperly on behalf of the defendant. If a vacancy occurs in the position of tutor, the undertutor must inform the court that a new tutor must be named. The undertutor does not move into the position of tutor when a vacancy does occur. Parents may want to consider whether it is always a good idea to name one parent as the tutor and the other as the undertutor. Should the tutor predecease the undertutor, the undertutor would *not* be allowed to take over the duties of the tutor even though he may actually be the most appropriate person for the job.

Can the decree granting the continuing tutorship be contested?

The individual who is the subject of the continuing tutorship decree, as well as any other person who may be adversely affected by the decree, can contest this restriction on the minor's legal capacity. To do so, one must challenge the decree in the court of the parish of the individual's domicile and must submit evidence to justify emancipation.

Such evidence can include professional reports or opinions that the individual is capable of making informed decisions on his own behalf. Should the court decide to revoke the continuing tutorship, all of the defendant's rights and legal authority will be reinstated.



CHAPTER 4: REPRESENTATION AND MANDATE

(formerly known as "Power of Attorney")

2.1 Procedures and Effects

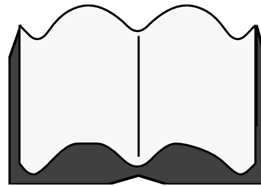
Sometimes an individual wants to give someone else legal authority to act on his behalf. The individual may no longer want to, or feel able to, handle certain personal affairs such as business matters or health care decisions. In this situation, "representation" can be used to give decision-making authority to someone else.

Although the term "Power of Attorney" is still commonly used, the law was changed to prevent misunderstandings associated with the word "attorney". In most cases, the person being given the authority to act on behalf of another is not a

lawyer, and is not legally authorized to practice law.

Unlike other proceedings (interdiction, continuing tutorship and in some cases the decision to grant a representative payment), representation is purely voluntary. The person granting the representation decides what power to grant and to whom. The person may also change his mind. Moreover, the person does not lose or give up ultimate authority to make decisions; rather, the authority and responsibility are shared with another person.

Simply stated, representation (by the methods discussed in this chapter) is a legal instrument by which one person gives to another person the power to perform certain activities *on his behalf*. The person granting the authority is called the principal. The person who agrees to accept the authority is the representative.



The laws generally governing REPRESENTATION (technically called representation and mandate) may be found in Title XV of the Louisiana Civil Code, articles 2985 through 3034.

Who may grant representation?

A legally competent adult may give another authority of representation (i.e., the authority to represent him or her). He or she must be able to understand the effects of such an arrangement. Therefore, someone who has been declared incompetent by a court is not eligible to grant representation.

The validity of a representation can be questioned if the principal does not appear to understand the nature and the consequences of granting a power of attorney. This may protect a person who could be tricked into signing a representation by someone wanting control over a principal or his finances. Due to the important nature and extent of power being given, it is essential to choose an agent who is responsible and trustworthy (e.g., a close friend or relative).

There are two types of representation, called “Procuration” and “Mandate”, which may be granted by a qualified person. Although the terms are sometimes used interchangeably, there is a legal distinction.

1. **PROCURATION**

   A “Procuration” is a unilateral act (i.e., performed by only one party) whereby one person (the Principal) voluntarily gives another person (the Representative) the authority to represent him or her, and to act on his behalf. This action, in itself, does not require the representative to agree to accept the grant of representation.

   It is important to understand that, when someone grants a Procuration, the representative generally is NOT legally required to accept this authority, and may choose not to act as representative for the principal. Before a person executes a procuration, he or she should be certain that the intended representative is willing to act as their representative.

2. **MANDATE**

   A “Mandate” is technically a legal contract between the principal and his intended representative, who accepts the legal authority and responsibilities granted by the principal in the procuration. A “Procuration” becomes a “Mandate” when the representative accepts the authority granted by the principal. Once a mandate has been established, the representative has the legal responsibility, and authority, to act on behalf of the principal. In a contract of mandate, the representative is called the “mandatary.”

Who may receive the authority of representation?

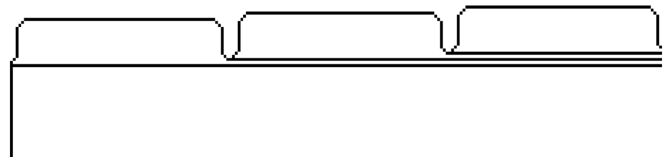
The contract of mandate is completed only when a competent adult agrees to become the representative, or "mandatary," of the principal. Thus, a procuration may not be legally effective until the intended representative accepts the authority given by the principal. An emancipated minor also may become a representative (or mandatary), but the principal cannot hold such a representative/mandatary responsible in all matters.

How is a mandate granted?

A mandate may be granted in a notarized statement (signed in front of two witnesses and a notary public); by any other form of writing (including a letter); or by oral agreement. An oral mandate is not recommended since it may be difficult to prove that it was given and exactly what power was granted to the mandatary.

Are there different types of mandates?

There are two basic types of mandates. A general mandate gives the mandatary authority over all personal and financial matters. A special mandate grants more limited power, giving authority to the mandatary only in matters specifically stated. It can be limited by time (for example, "for the three months from July 1, 2001 through September 30, 2001") or by the type of power conferred (for example, "all financial affairs" or "any health care/medical decisions").



It should be noted that certain items require express power from the principal; in other words, they must be written into the mandate to be given legal effect. These include the power to sell or buy, to accept or reject a succession, to make a loan or acknowledge a debt, to agree to bills or sign promissory notes, to compromise, to go to arbitration, to make health care decisions, and to transact matters in a lawsuit.

What are the obligations of the mandatary?

The mandatary must act as prudent administrator on behalf of the principal. He or she must act in accordance with the wishes of the principal and act only in matters for which authority has been granted. If there is a contract in which a mandatary is being paid to perform his duties on behalf of the principal, the mandatary will be held to a higher standard of responsibility to the principal than a "gratuitous" mandatary (i.e., a "volunteer" who may be acting on behalf of a family member, close friend, etc.). However, a "gratuitous mandatary" also has a legal duty to act as a prudent administrator, and in accordance with the wishes of the principal.

If the mandatary acts negligently or fraudulently, he or she will be legally responsible to the principal for damages. Any action taken by the mandatary which was not within the power granted by the principal is null and void, meaning the action has no legal effect. Any repercussions or damages become the personal responsibility of the mandatary unless the principal later agrees with the action and agrees to be responsible. The principal may ratify the action taken by the mandatary by agreeing to be responsible.

If there is more than one mandatary acting on behalf of the principal, then each mandatary is responsible only for his own wrongdoing and not for the action of any other mandatary.

A mandatary may not enter into contract with himself and the principal unless he or she is expressly authorized by the principal to do so. (For instance, a mandatory may not sell the principal's property to himself without the principal's specific permission).

If a mandatary represents more than one party in a business transaction, the mandatary has a duty to inform each party that he is representing the other(s).

The mandatary must give an accounting of his activities to the principal. The mandatary is required to turn over to the principal anything he or she receives on behalf of the principal, and to pay to the principal interest on any sums of money that the mandatary applies to his own use.

If a "special mandate" is established for a certain duty (such as for the sale of property), and the mandate is to end upon the fulfillment of the duty, the mandatary has a legal obligation to inform the principal when the duty has been fulfilled.

What are the obligations of the principal?

The principal must abide by all contracts made by the mandatary that were within the mandatary's authority.

Generally, the mandatary is not paid a fee unless there is an agreement to that effect. (A mandatary who is being paid for his/her duties is held to a stricter standard of responsibility than a "gratuitous" mandatary.) However, a gratuitous

mandatary is entitled to be reasonably compensated for expenses or losses incurred in carrying out his duties as mandatary. The mandatary may reimburse himself from the principal's funds for such expenses.

If several principals appoint a single mandatary to take care of a matter on their behalf (for example, one business transaction involving several persons), then each principal is responsible to the mandatary for any matters related to the carrying out of his duties. As noted above, the mandatary has an obligation to inform each principal of any other principals that the mandatary is representing in such a situation.

Can a principal be forced to grant someone the authority to be their representative?

No. Procuration and mandate must be fully voluntary. You cannot be forced to make another person your representative, and the person you choose must agree to accept the responsibility. This authority must be given freely and can be revoked at any time.

Can a principal still act on his or her own behalf, even if he or she has made someone their representative?

Yes, a principal can still make his or her own decisions. The principal's right to make decisions may not be taken away with a procuration or mandate, nor can it be used to force the principal to make decisions he or she does not wish to make. The power granted is to be used by the representative in the event that the principal becomes incapacitated or wants the representative to make certain decisions or execute certain acts on his or her behalf.

Does the mandate continue if the principal becomes incapacitated?

Unless the mandate states otherwise, it is durable and continues even if the principal becomes incapacitated or suffers any condition that makes revoking (canceling) it impossible or impractical. It is important, therefore, that anyone granting a mandate choose as a mandatary a person whom he trusts implicitly to have the principal's best interest at heart.

How will other people know the mandate has been established?

If the mandate is given orally, the principal should inform anyone who should know. If the mandate is written, the document is proof of the granting of the power and the identity of the mandatary. The mandatary can show it to appropriate persons in order to carry out his duties. For example, if it is a mandate

for medical decisions, the mandatary may show it to the principal's physician; if it is for financial matters, the mandatary may show it to the principal's bank.

The mandate may be made a matter of public record by having it recorded in civil district court. This may be particularly appropriate if the mandatary is handling property and business transactions.

Can the mandate be revoked?

The principal can revoke (take back) the powers granted in a mandate at any time. It is advisable to revoke a mandate or procuration via a written notarized document. If the mandate was written, the principal should ask the mandatary to return the document. The principal should also advise all persons with whom the mandatary had authority to act that the mandate has been revoked. Until these persons are informed, the principal is responsible to them for any actions taken by the mandatary. However, the principal does have a cause of action against a mandatary who acts without proper authority.

After revoking a mandate, the principal may choose another mandatary or retain all decision-making authority for himself.

Are there other ways in which the mandate can be terminated?

A mandate is terminated when any of the following occur: the principal grants the same authority to a new mandatary and advises the old mandatary that he/she has been replaced; the mandatary resigns; the principal dies; the mandatary dies; if either the mandatary or the principal becomes bankrupt; the mandatary is interdicted; a curator is appointed for the principal following an interdiction proceeding; or the time or matter set forth in a special mandate is completed.

Will the principal's Social Security checks be sent to the mandatary?

The Social Security Administration (SSA) will send benefit checks to someone other than the beneficiary only if that person has been designated by SSA as the representative payee. However, a mandate can be used to name the agent as the person preferred by the principal to be representative payee in the event that SSA deems it necessary to designate a representative payee. See Chapter Five for more information regarding representative payees.

What else may a mandate include?

A “living will” may be included in the mandate, stating the principal's wishes for life-sustaining procedures to be withheld or withdrawn if the principal becomes terminally ill; or the principal may designate a person (a mandatary) to make a decision in those circumstances.

The mandate may include a clause in which the principal nominates a person

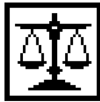
to be his curator in case of interdiction of the principal.

Health-Care Planning

The principal can choose the person(s) he wishes to assist in decision-making and can determine how much authority is shared and for how long. The principal can choose to make the designation of authority effective immediately, or to become effective in the event that he or she can no longer act for himself. The principal can revoke the instrument at any time.

State law (LSA-R.S. 9:3890) provides for a CONDITIONAL PROCURATION. A conditional procuration is essentially a mandate which becomes effective when the principal, due to incapacity, infirmity or disability, becomes unable to make or to communicate reasoned decisions regarding the care of the principal's person or property.

A conditional procuration is executed in the same manner as a standard mandate or procurement, as described above. As with a similar instrument, it allows a principal to nominate a "mandatary", to make decisions regarding health-care, managing property, etc. It is "conditional" is the sense that it does not become legally effective until the principal is declared unable, due to disability or infirmity, to make decisions regarding the care of the principal's person or property. The incapacity must be confirmed by authentic act, signed either by two physicians licensed to practice medicine by the Louisiana State Board of Medical Examiners or, if the executed condition procuration so provides, by the mandatary/agent appointed in the conditional procuration, and the attending Louisiana physician.



CHAPTER 5: REPRESENTATIVE PAYMENT

5.1 Procedures and Effects

The general policy of the Social Security Administration (SSA) is that every recipient of Social Security or Supplemental Security Income (SSI) cash benefits has the right to manage his benefits. However, SSA also recognizes that some beneficiaries may be unable to do so due to youth or disability. If SSA determines that the beneficiary is not able "to manage or direct the management of benefit payments" in his own interest, then SSA will appoint a representative payee to receive and manage the benefits on behalf of the beneficiary. A representative payee may be either a person or an organization.

Sometimes the beneficiary requests or agrees to the appointment of a representative payee. However, SSA has the authority to make this determination against the wishes of a beneficiary, even one who is legally competent.

The rules governing the principles and policies of representative payment may be found at Title 20 Code of Federal Regulations, Subpart F, Sections 416.601 through 416.665.

What conditions lead to representative payment?

A beneficiary of disability benefits who is medically determined to be a drug addict or an alcoholic must be assigned a representative payee.

Generally, if a beneficiary is under age 18, benefits are paid to a representative payee. However, there are exceptions. Direct payment will be made to a beneficiary under age 18 who shows the ability to manage the benefits. Examples include: a parent who files for benefits on behalf of himself and/or the child and has experience in managing personal finances; a beneficiary capable of using the benefits to provide for his own needs, and no qualified payee is available; a beneficiary within seven months of age 18 who is filing an initial application.

SSA will consider designating a representative payee when it receives information that the beneficiary is legally incompetent, mentally incapable of managing the payments, or physically incapable of managing or directing the management of the benefits.

What information is considered by SSA?

If a beneficiary is found by a court to be legally incompetent (i.e., a judgment of interdiction or continuing tutorship), then a representative payee will be appointed.

Medical evidence from a physician or other medical professional based on a recent examination and on knowledge of the beneficiary's conditions may be used by SSA. The evidence should include information concerning the nature of an illness or condition, the chance of recovery and an opinion as to whether the beneficiary is able to manage or direct the management of the benefits.

Statements by friends, relatives and others who know the beneficiary and can comment on his ability to manage the benefits will be considered by SSA.

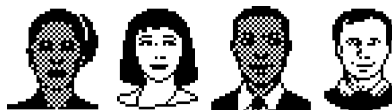
How is a representative payee selected?

In many cases a family member or friend has raised the issue of the beneficiary's inability to manage payments, and this individual then applies to become the representative payee.

SSA may select a person, agency, organization or institution to be representative payee. To determine the payee that will best serve the interests of the beneficiary, consideration is given to: the relationship of the proposed payee to the beneficiary; the amount of interest shown in the beneficiary; any legal authority already obtained to act on behalf of the beneficiary; whether the potential payee already has custody of the beneficiary; and whether the potential payee will be able to be aware of and take care of the needs of the beneficiary.

SSA has established categories of preferred payees, which serve as flexible guidelines in determining who will best serve the interests of the beneficiary.

Preferred payees for beneficiaries 18 years old and older are: legal guardian, spouse or other relative who has custody or demonstrates strong concern; friend with custody or strong concern; public or nonprofit agency or institution with custody; private institution with custody; other person able and willing.



Preferred payees for beneficiaries under age eighteen are: natural or adoptive parent with custody, or a guardian; natural or adoptive parent without custody but who contributes to the beneficiary's support and demonstrates concern for the beneficiary's well-being; natural or adoptive parent without custody, not contributing to support, but demonstrating concern; a relative or step-parent with custody; a relative without custody but contributing support and demonstrating

concern; relative or close friend without custody but demonstrating concern; an authorized social agency or custodial institution.

How does the beneficiary learn of the representative payment decision?

A written notice is given by SSA to the beneficiary or to an individual acting on behalf of the beneficiary (curator or tutor) of its decision to appoint a representative payee.

What if the beneficiary objects to the representative payment decision?

If the beneficiary does *not* object to the appointment of a representative payee or to the person selected, then SSA will issue its determination and the payee will be appointed.

If the beneficiary objects, he may review the evidence used by SSA in deciding that representative payment is needed. The beneficiary may submit additional evidence to SSA. SSA will review all new evidence and then issue a determination. If SSA decides to appoint a representative payee, the beneficiary may object to the appointment and/or to the person selected. To make an official appeal of the decision, the beneficiary must request a reconsideration. This can be filed at any local SSA office. The beneficiary should keep a copy of the written request for his files.

If upon reconsideration SSA determines that the beneficiary does not require a representative payee, then the beneficiary continues to receive benefits directly and the matter is closed. However, if SSA reconsiders the decision and still determines that it would be in the best interest of the beneficiary to have a representative payee, one will be appointed.

What are the responsibilities of the representative payee?

The greatest responsibility of a representative payee is to use the payments *only* for the use and benefit of the beneficiary. SSA will consider this responsibility met if the payments have been used for the beneficiary's "current maintenance." SSA defines current maintenance to include food, shelter, clothing, medical care and personal comfort items.

A representative payee must account for the use of the benefits. SSA may require periodic written reports which include the amount of benefits received during this period, how the money was spent, how much was saved and how savings were invested, where the beneficiary lived and the amount of income from any other sources.

Representative payees should maintain detailed records and documentation, and are forbidden by law to co-mingle the beneficiary's money with their own.

The account should clearly state that the representative payee does not have

a personal interest in the funds but is acting with legal authority on behalf of the beneficiary. All interest and dividends are the property of the beneficiary and not of the payee.

A representative payee who has conserved or invested benefit payments must transfer funds to a successor payee or to SSA on request.

The representative payee has the responsibility to notify SSA of any event that will affect the amount of the benefits the beneficiary receives or the right of the beneficiary to receive benefits. Events may include change of income or assets, marital status, medical improvements, change in living arrangements or make-up of household.

Reports should be made within 10 days of the event to avoid a penalty. A representative payee should respond to requests for information from SSA within 30 days to avoid a potential termination of benefits.

It is best to make or confirm a report in writing. Keep a copy so that you will have proof that you have complied with the reporting requirements.

If the beneficiary receives care in a federal, state or private institution due to a mental or physical incapacity, then current maintenance would include the customary charges for care and services provided, expenses for items to aid in the recovery or release of the beneficiary, and costs of personal needs which will improve the beneficiary's condition. Any remaining money may be used for a short time to maintain the beneficiary outside of the institution unless a physician has certified that the beneficiary is not likely to return home.

If a beneficiary is in an institution which receives Medicaid funds on the beneficiary's behalf, any money due (usually called the personal needs allowance) shall be used for the personal needs of the beneficiary and not for current maintenance.

The representative payee is not required to use benefit payments to pay any debt which arose prior to the first month the benefits were paid to the payee. The payee may pay any such bill only if current and reasonably foreseeable needs of the beneficiary are met. All debts incurred after the payee is appointed should be paid.

If benefits are not needed for current maintenance or for reasonably foreseeable needs, then the funds should be conserved or invested in accordance with rules followed by trustees. Funds over $150 should be deposited in an interest-bearing account. Preferred investments for excess funds include U.S. Savings Bonds and deposits in an interest or dividend paying account in a bank, trust company, credit union or savings and loan association which is insured under either federal or state law.

What if the representative payee misuses the money?

If the representative payee uses the benefit payments improperly (for

example, for his own personal needs), SSA is *not* liable to the beneficiary. SSA's obligation to the beneficiary is fulfilled when the correct payment is made to the payee. SSA *will* select a new payee if it learns that the current payee has used benefits improperly. The representative payee who has misused funds is personally liable to the beneficiary.

When would a new representative payee be selected?

SSA will select a new representative payee if: a preferred payee is found; the current payee has not used benefit payments on behalf of the beneficiary; the current payee has not carried out any other responsibilities under SSA guidelines; the current payee has died; the current payee no longer wishes to be the payee; the current payee is unable to manage the benefit payments properly; the current payee fails to cooperate in providing requested evidence, accounting or other information.

When will representative payment be terminated?

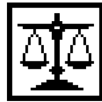
If the beneficiary proves to SSA that he is mentally and physically able to manage or direct management of benefit payments, then direct payments to the beneficiary will resume.

A beneficiary who makes a request for direct payment should supply information regarding his ability to receive and manage the payments. The information presented to SSA could include: a statement from a physician or from a medical officer of an institution where the beneficiary was confined, to the effect that the beneficiary is able to manage or direct management of funds; a certified copy of a court order stating that the beneficiary is now legally competent; or any other evidence that would prove the beneficiary's ability to manage or direct management of benefit payments.

If SSA approves the request, it will transfer to the beneficiary any conserved or invested funds and interest or dividends earned, as well as direct benefit payments.

For most individuals receiving benefits, the payments represent all or nearly all of their income. This means a representative payee gains a considerable amount of control over the beneficiary's quality of life. Therefore, representative payees should be appointed only when necessary to protect the beneficiary's quality of life. It is essential that anyone serving as representative payee possess both the ability and the interest to act in the best interests of the beneficiary. Additionally, anyone with knowledge of improper use of benefit funds by a representative payee should report that fact to SSA.

Note: there are processes similar to representative payment for recipients of Railroad Retirement and Veteran's Administration benefits.



CONCLUSION

Altering the legal status of an individual through full or limited interdiction or a continuing tutorship is a very serious step to take when one is attempting to assist another who cannot adequately act on his behalf. Before proceeding with any of these actions, one should always consider what specific assistance the individual needs and determine what remedy most closely fits that need without infringing on other rights of the person. A mandate, the creation of a trust, or an appointment of a representative payee for public benefits are less intrusive alternatives to interdiction and continuing tutorship and may be all that is needed.

Understanding the full extent of the individual's abilities and needs coupled with legal advice from those familiar with this area of the law should help to ensure protection of the individual's civil rights, while securing removal of only that decision-making authority which is absolutely necessary.

GLOSSARY

Beneficiary: one who benefits (monetarily) from the act of another e.g., the recipient of social security income. *See page 29.*

Competency: the ability of an individual to manage his own affairs. Of legal age without mental disability or incapacity. *See page 1.*

Conditional Procuration: an instrument in which a person (principal) voluntarily conveys to another person the authority to act on his behalf in the event that doctors declare the principal disabled and unable to make or to communicate reasoned decisions regarding the care of his person or property. *See page 28.*

Continuing Tutorship: a court procedure by which a person is declared to be a "permanent minor," and decision-making authority is maintained by the parent or tutor as determined by the court. May be applied only to persons with less than two-thirds of the average mental ability of a person of the same age with normal intelligence. *See Chapter 3.*

Curator (also curatrix): the person appointed by a court to make decisions on behalf of an interdicted individual. Court appointed guardian to care for the property and/or person of an incompetent or minor. *See Chapter 2.*

Defendant: the individual who is being considered for interdiction by a court. Generally, the person against whom relief is sought; the party denying the claim. *See page 6.*

Domicile: a person's true, fixed and permanent home. The place where, whenever an individual is absent, he has the intention of returning. *See page 8.*

Durable: continuing even in the event of the principal becoming incapacitated e.g., *durable* mandate does not end if principal becomes incapacitated. *See page 26.*

Emancipation: a person under eighteen years of age who becomes self-supporting and is judged by the court to be able to care for himself and make his own decisions.
See page 17.

Estate: an individual's financial (personal or business) affairs, personal property

and real estate. *See page 7.*

Express power: the power to act which has been directly and distinctly stated; manifested by direct and appropriate language as opposed to what might be inferred from conduct. *See page 24.*

Interdict: an individual who has been found incompetent by a court in an interdiction proceeding. *See page 4.*

Interdiction: a judicial proceeding in which authority for making decisions regarding the affairs of an individual is transferred to another person, due to a finding that the individual is incompetent and unable to manage his own affairs. *See Chapter 2.*

Limited Interdiction: a form of interdiction in which the interdict retains some decision-making rights while a curator is appointed by the court to handle specified decision-making for the interdicted person. *See page 6.*

Mandate: a contract by which one person gives power to another to transact for him one or several affairs (see also *power of attorney*). *See page 23.*

Minor: a person under the age of legal competence - under eighteen in Louisiana. *See page 1*.

Petitioner: the person who is seeking the interdiction of another person. *See page 6.*

Petition: actual document listing the claims made by petitioner against the defendant. *See page 8.*

Power of Attorney: written or oral authorization to act as agent for another (see also *mandate*). *See Chapter 4.*

Principal: a person who grants another authority to act for him under a power of attorney/mandate. *See page 22.*

Provisional Curator: individual temporarily appointed by the court prior to the completion of an interdiction proceeding, to look after the defendant's estate, person and/or affairs. *See page 13.*

Procuration: a unilateral act by which a person (principal) confers on another the authority to act on his or her behalf. *See page 23.*

Ratify: to approve, sanction or validate the act of another. When an agent acts outside his authority, the principal may take responsibility for the act by approving it after the fact. *See page 25.*

Representation: the voluntary delegation by one person (principal) to another (representative) to take actions and/or make decisions on his (the agent's) behalf. *See page 22.*

Representative: (see agent) a party who has been given legal authority to take action(s) and/or make decision(s) on behalf of another. *See page 22.*

Representative Payment (Payee): individual designated by the Social Security Administration to receive social security benefit checks on behalf of another who is unable to care for his own affairs. *See Chapter 5.*

Revocation Hearing: a court proceeding to determine whether an individual should remain interdicted. *See page 15.*

Serve: delivery of a petition or complaint to a person who is officially notified of legal action or a lawsuit in which he has an interest. *See page 8.*

Summary Proceeding: a court action that is brief and concise, in which there is no jury, and which is given priority in scheduling. *See page 9.*

Tutor: a person legally responsible for the care of a minor child under the age of eighteen, or for the affairs of an adult who is the subject of a continuing tutorship. *See page 16.*

Undercurator: a person appointed by the court to act on behalf of the interdict when the interests of the curator and the interdict are in conflict. *See page 14.*

Undertutor: a person appointed by the court to monitor the tutor's actions and inform the court whenever the tutor fails to act or acts inappropriately on behalf of the defendant. *See page 21.*

Resource List

Louisiana Developmental Disabilities Council
Post Office Box 3455
626 Main Street, Suite A (corner of Main and 7th Street)
Baton Rouge, LA 70821-3455
225-342-6804
1-800-450-8108
Fax: 225-342-1970
http://www.laddc.org/main/

Louisiana Guardianship Services, Inc.
PO Box 64844
Baton Rouge, LA 70896-4844
www.laguardianship.org
greg@laguardianship.org

Governor's Office of Elderly Affairs
P. O. Box 61
Baton Rouge, LA 70821-0061
225-342-7100
Fax: 225-342-7133
http://goea.louisiana.gov/

Social Security Office
Toll-free 1-800-772-1213

The Arc of Louisiana
606 Colonial Drive, Suite G
Baton Rouge, La. 70806
225-383-1033
thearc@thearcla.org
http://www.thearcla.org/

Governor's Office of Disability Affairs
P. O. Box 94004
Baton Rouge, LA 70804
877-668-2722
http://www.gov.state.la.us/index.cfm?md=subsite&tmp=home&navID=45&cpID=0&catID=3
disability.affairs@la.gov

AARP of Louisiana
301 Main St. #1012
Baton Rouge, LA 70825
866-448-3620
www.aarp.org/states/la
la@aarp.org

Mental Health America of Louisiana
5721 McClelland Drive
Baton Rouge LA 70805
225-356-3701
800-241-6425
Fax: 225-356-3704
http://www.mhal.org/index.htm

D.I.A.L.
Disability Information Access Line
800-922-DIAL (3425)

ADVOCACY CENTER

SERVING PEOPLE WITH DISABILITIES AND SENIOR CITIZENS

Call ***TOLL-FREE*** *1-800-960-7705*
Email advocacycenter@advocacyla.org
Visit our website: www.advocacyla.org
Find us on Facebook: www.facebook.com/advocacyla
or contact the Advocacy Center nearest you.

NEW ORLEANS
8325 Oak Street
New Orleans, LA 70118-2043
504-522-2337
Fax: 504-522-5507

BATON ROUGE
530 Lakeland Drive
Baton Rouge, LA 70802-4441
225-925-8421
Fax: 225-925-9825

LAFAYETTE
600 Jefferson Street Suite 812
Lafayette, LA 70501-6982
337-237-7380
Fax: 337-237-0486