

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**



**DISABILITY RIGHTS
LOUISIANA**
Protect. Advocate. Empower.

LEGAL STATUS IN LOUISIANA

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PREFACE

Disability Rights Louisiana (DRLA) is a private, non-profit corporation designated by the Governor as Louisiana's protection and advocacy agency for persons with disabilities.

DRLA also provides legal advice and representation to seniors living in nursing homes.

Each year DRLA receives many requests for information and assistance from elderly individuals and/or individuals with disabilities. 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, from parents of children with disabilities who realize the need to plan for the child's future care, from individuals with disabilities who are uncertain about their legal status or who want to change their status, and from individuals who are competent, but want to make provisions for their care should they become incapable or incompetent.

This guide explains the methods by which a person's legal status can be changed. A person's *legal status* is technically 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 describes the legal options available.

For ease of understanding, legal terms are explained in the text and there is a glossary following the Conclusion. 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.

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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 (18) years of age or older are competent and capable of governing themselves.

Until the age of eighteen (18), 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 (18), he has reached 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 is enjoyed by every adult who is eighteen (18) years of age or older, unless a court declares him incompetent. This is true for individuals with mental illness or developmental disabilities. Thus, upon reaching the age of majority (eighteen) a person with a developmental 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 the moment a child turns eighteen (18), parents lose the legal authority to make any decisions on behalf of their child. This is true even if the child has a profound disability and still needs the assistance of his family in order to meet his basic needs. The law still regards this individual as a competent adult. Unless the legal status of the individual with the disability is altered by the court system, only he has the right to manage his affairs, consent to medical treatment, and make decisions about every facet of his 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 do not have the legal authority to act on his behalf unless they have been granted that authority by a court (through interdiction), by the elderly individual himself (through power of attorney), 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 that person is not competent to grant the authority, one may request that the state court transfer decision-making authority through 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 When a Change in Legal Status May be Necessary

A change in legal status may be necessary when an adult, is unable to make decisions on his own behalf. In such a situation, someone else needs the legal authority to make decisions on his behalf. This legal transference of decision-making authority anticipates that decisions made on behalf of the individual are made in his best interests.

As previously stated, a change in legal status may be appropriate when an individual with a disability who attains the age of majority lacks the capacity to make decisions. In this case, the parent may petition the court and ask that he be allowed to maintain decision-making authority over the child even though the individual is eighteen (18) years of age.

A change in legal status may be required when a person previously able to make decisions, loses that ability as a result of severe mental illness, brain injury, or a medical condition adversely affecting mental ability. In some instances, a medical condition such as one associated with aging, results in recurring periods of inability to make decisions.

Medical treatment, the use of resources, residency, etc., are examples of decisions that must be made for an individual when he lacks capacity. For some, family members make decisions for them; for others, particularly those in institutions, staff members make those decisions. However, relatives and staff members do not have the legal authority to make any decisions for one, who regardless of capacity, is presumed competent by law.

Because a change in legal status results in deprivations of basic human rights, Louisiana law provides protections. Before an individual can be divested of any right through interdiction, a court hearing must be held to determine whether the individual has capacity to make informed decisions. An adult whose capacity is in question must be represented by an attorney at the hearing.

If the court finds the person incompetent to handle some or all of his affairs, then the court must decide on the appropriate person to make decisions for the individual. Similar protections exist when a continuing tutorship is sought and the individual is over the age of eighteen (18). Court-appointed curators and tutors, in addition to persons granted representation, and representative payees all have legal obligations to act in the best interests of the person for whom they make decisions.

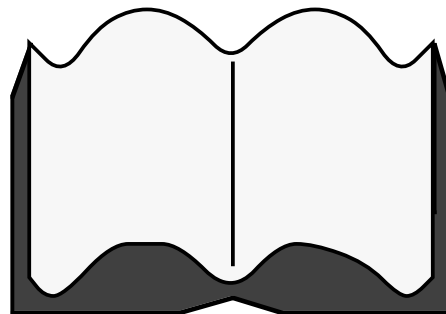
In the event that you believe an interdiction or continuing tutorship is necessary, you will need the assistance of an attorney. If you choose to grant decision-making authority to another through a procuracy or mandate, you should also consult an attorney. Finally, contact the Social Security Administration if a representative payee is needed for yourself or someone else.

CHAPTER 2: INTERDICTION

2.1 Legal Consequences and Effects of a Full Interdiction

Interdiction is the most common procedure for altering the legal status of an individual. However, a full interdiction is the most intrusive procedure and is often far more sweeping in its effect than is actually necessary. The person subject to the interdiction, known as the interdict, is deprived of all rights to handle any aspects related to the affairs of his person and his property. These rights are transferred to a person designated by the court, who is granted full authority to act on behalf of the interdict. This individual is called a curator and if the person is a woman she is called a curatrix.

Due to the extensive loss of rights that result from a judgment of full interdiction, the courts have described it as a "*civil death*". To fully understand the reference to civil death, one must understand the range of rights lost to a full interdict.



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 4031 through 4557.

What rights are lost by a person subject to a full interdiction?

The Right to Contract. The law is clear that a full interdict does not have the capacity to enter into any type of contract. For example, an interdict loses the right to buy, sell, or mortgage real estate, open or close a bank account, take out a loan, execute a procuration or mandate, etc. All of these rights and responsibilities are transferred to the curator.

The Right to Marry. Under Louisiana law, marriage is a civil contract and as a result, a person subjected to a full interdiction cannot marry without the consent of his curator.

The Right to Vote. State law and the Louisiana Constitution provide that an interdict cannot register to vote nor can he vote in any elections that occur after the judgment of interdiction is issued. If the individual was registered prior to the judgment of interdiction, the registrar of voters will notify the interdict that he cannot vote as long as the full interdiction remains in effect.

The Right to Accept or Renounce Successions. Only the curator can accept or renounce an inheritance; the interdict has no voice in the matter.

The Right to Sue or be Sued. Similarly, a person who is fully interdicted must rely on his curator to sue on his behalf. With the exception of tort and family lawsuits, an interdict cannot be named as a defendant.

The only exception with regard to lawsuits: an interdict always retains his capacity to sue to revoke or modify his interdiction.

Other Rights. In addition to the above, an interdict loses, to name a few, the right to drive a motor vehicle, consent to medical treatment, make decisions regarding his education and leave the state without permission. In other words, an interdict loses the right to make many decisions that affect his everyday life.

As you can see, full interdiction is very restrictive. While at times it is necessary, more often than not, there are more appropriate alternatives to consider.

2.2 Limited Interdiction: An Alternative to Full Interdiction

In 1981, in recognition of the severe deprivation of rights resulting from a judgment of full interdiction, the Louisiana legislature enacted a law providing for limited interdiction. This law provides courts with the flexibility to fashion an effective remedy for an individual who is in need of assistance in some areas, but is capable of handling his affairs in others.

A limited interdiction infringes upon the rights of the interdict only to the extent that his rights cannot be protected by any lesser restrictive means. While some decision-making authority is transferred to the curator, the interdict retains all other rights not specifically granted to the curator. For example, an adult with a moderate intellectual disability may need assistance with financial matters, but otherwise be fully capable of managing matters not involving money management. With a limited interdiction, his curator may be granted the authority to manage his finances without dispossessing him of his right to marry, vote, drive, etc., thus allowing the limited interdict to retain the right to make those daily decisions of which he is capable.

Likewise, an elderly individual who develops an infirmity affecting his ability to make decisions may need assistance with certain financial matters, but be capable of managing his other affairs. Through a limited interdiction, his curator can provide support within his specific area of need without infringing upon other basic civil rights.

2.3 Interdiction/Limited Interdiction: Practice and Procedure

The procedures for obtaining a full interdiction or a limited interdiction are essentially the same and differences are noted where appropriate. It is important to understand that an interdiction proceeding is a lawsuit, and as a result there are legal procedures that must be followed. Also, just like in a “*regular*” lawsuit the person seeking the full or limited interdiction is the petitioner and the individual who is the subject of the proceeding is the defendant.

Who is the proper subject of an interdiction proceeding?

Pursuant to state law, the proper subject of an interdiction proceeding must be eighteen (18) years or older or an emancipated minor, and be unable to consistently make reasoned decisions regarding the care of his person and/or property, or be unable to communicate those decisions in a manner that others can understand. 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 the inability to make day-to-day personal decisions 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 the individual lacks the capacity to manage his financial affairs, personal property and/or real estate. It is important to note that poor decision making is not the same as "*unable to consistently make reasoned decisions*": everyone has the right to make bad decisions, including individuals with disabilities.

For a full interdiction, 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 person or to administer one's estate must be due to "*an infirmity*". It is important to understand that mental illness, disability or other incapacity, such as one stemming from a traumatic brain injury, that gives rise to the need for interdiction must be so serious in nature that it results in a significant impairment of the individual's ability to exercise his judgment. Chronic substance abuse may qualify as such an infirmity, but advanced age alone does not.

Louisiana law has a separate provision that allows for the interdiction of an individual who cannot care for his person or manage his estate due to a disability that prevents any type of communication with others. A person who can communicate his desires in any way, is not a proper subject for an interdiction.

Who can obtain the interdiction of another?

Anyone can seek the interdiction of another; however, the court will examine the motives of a petitioner who has not had a significant relationship with the defendant. This is to ensure that the petitioner does not have an ulterior motive in pursuing legal control over the person and/or estate of one he does not know well.

Where is a petition for interdiction filed?

A petition for interdiction is generally filed in the civil district court in the parish where the defendant is domiciled. (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 is not domiciled in Louisiana, then the petition is filed in the parish where he resides. If the individual neither resides nor is domiciled in Louisiana, then the petition is filed in the parish where the defendant is found. In other words, a petitioner cannot file for an interdiction in a parish convenient to him. Finally, any subsequent interdiction proceedings must be filed in the parish where the original judgment was rendered.

Who pays the cost of an interdiction?

As with other legal proceedings, there are costs associated with filing for an interdiction. The first cost incurred is the cost of the attorney retained by the petitioner to represent him in the suit for interdiction. Second are court filing fees for the initial and subsequent pleadings. Filing fees may or may not include the sheriff's fee to serve, (deliver the petition to) the defendant. If service is not included in the filing fee then this is an additional cost. The third cost is the fee for the attorney appointed by the court to represent the defendant. The court determines the fee at the completion of the case and orders that it be paid. This fee varies depending on the complexity of the case.

Additional fees include costs necessary to prove to the court that an interdiction is necessary. For example, psychological and/or medical evaluations, expert witnesses fees, copying charges for records, etc.

The court can assign these costs to either party as it sees fit. However, the petitioner will not be entitled to attorney's fees paid when the judgment is rendered 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 the judgment of interdiction and the court determines that he **knew or should have known that the allegations used to justify the interdiction were false**. This provision in the law is seldom used, but the court may order a petitioner to pay these damages to the defendant, as well as all of the costs of the lawsuit.

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

As with every lawsuit, the defendant in an interdiction proceeding must be personally served by the sheriff's office with a citation and a copy of the petition for interdiction. In addition, all individuals named in the petition such as the defendant's spouse, children, parents or others with an interest in the defendant's person or property, must receive a copy of the petition by certified mail.

How does the defendant respond?

The law requires the defendant file an answer to the lawsuit within fifteen (15) days of service of the citation and petition. The defendant should contact an attorney as soon as he is served with 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 file an answer, the petitioner must ask the court to appoint an attorney to represent the defendant. The court *must* appoint an attorney because a defendant in an interdiction proceeding cannot appear in court without one.

Once appointed to represent the defendant, the attorney must meet with the defendant in person to discuss the case and review records that are immediately available. The appointed attorney must then file an answer to the petition for interdiction.

Does an interdiction proceeding require a hearing in court?

Due to the potential loss of liberty, interdiction proceedings always require a court hearing and are classified as "*summary proceedings*". Summary proceedings take precedence over other matters on the court's schedule. This means that a hearing is usually scheduled without the delays experienced in other types of lawsuits and the judge typically renders a decision at the close of the hearing or shortly 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 an infirmity that 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 evidence used to prove that an interdiction is necessary must be clear and convincing.

The defendant should be present at the hearing unless there is a good reason for his absence, such as his hospitalization; however, if the defendant is unable to be in the courtroom, the judge may hold the interdiction hearing where the defendant is located. The judge may also require that the curator be present at the hearing.

In addition, the judge may order that an expert with training or experience in the type of infirmity alleged, examine the defendant prior to the hearing. Many times the expert is a psychologist, psychiatrist or medical doctor who reports under oath his conclusion(s) regarding the defendant's competence. Both the petitioner and defendant may present expert witnesses, and at the hearing either party may call witnesses and cross-examine the witnesses of the opposing party. Also, the judge may question the defendant to determine his capacity.

If the court denies the interdiction, the case ends unless the petitioner challenges 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 will clearly state the responsibilities assumed by the person appointed as the interdict's curator. If the interdiction is temporary or preliminary, the judgment will include the date the interdiction terminates.

How is a curator appointed by the court?

The curator is the individual appointed by the court to act on behalf of the interdict. Often, the petitioner for the interdiction asks to be appointed curator, but not all petitioners are appointed. In fact, the law provides that certain persons be given preference to act as curators.

A competent person can nominate an individual to act as his curator. As a result, when deciding on whom to appoint as curator, the court first looks to see if the interdict designated in writing the individual that he would prefer to act as curator should the need arise. This person is usually appointed unless disqualified by the court.

If the interdict has not nominated a curator, the interdict's spouse is given preference over other relatives or interested parties. If there is no spouse or the spouse is unable to act as curator, the order of preference is as follows: an adult child of the interdict; a parent of the interdict; an individual with whom the interdict has lived for more than six months.

If none of the above is available, the court will appoint the applicant best qualified to serve as curator based on the individual needs of the interdict. Under no circumstances, can any of the following persons be named as curator: (1) a minor; (2) another interdict; or (3) a person who is not a resident of the state and who has no resident contact. In very rare cases will the court consider: (1) a convicted felon; (2) a person indebted to the interdict; (3) a person who is an adverse party in a lawsuit involving the interdict; or (4) an owner, operator, or employee of a long-term care facility where the interdict is receives care, unless that person is a relative of the interdict.

What requirements must a curator fulfill?

In order to act as curator, the individual must post a bond as security for the

faithful performance of his duties. This bond must equal the total value of the interdict's estate based on an inventory or detailed accounting of the interdict's property. This requirement only applies when a curator is given authority over the interdict's estate. If a limited interdiction does not give a curator authority over the individual's estate, a bond is not required.

Additionally, a curator must take and sign an oath that he will faithfully perform his duties. Once the bond, (if required) and the oath are submitted to the court, the clerk will issue letters of curatorship to the curator within ten (10) days. Letters of curatorship are proof positive that the court has authorized the individual appointed as curator to act on behalf of the interdict. The letters 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 duties and authority granted to a curator depend on the judgment issued by the court. When a full interdiction is granted, the curator is responsible for making all personal decisions for the interdict including where he lives, works, goes to school, etc. The curator also has the authority to consent to medical treatment for the interdict; however, procedures affecting the interdict's reproductive abilities require court authorization. Court authorization is also required to admit the interdict to a mental health facility or long-term care facility. In addition, an interdict cannot be removed from the state without prior court approval, and any lawsuits in which the interdict has an interest, must be brought by the curator on behalf of the interdict.

A judgment of full interdiction grants the curator the authority to administer the estate of the interdict and manage all of the interdict's finances. Any money or assets that the interdict may own must be used solely for the interdict's personal needs and *cannot* be used for the curator's needs. In order to ensure that the curator has used the interdict's resources appropriately, the court requires the curator file an accounting that clearly reflects the assets, income and expenses of the interdict, as well as the interdict's location and condition. The accounting must be filed 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 the interdict's income, resources and expenses,

so that this accounting can be prepared and filed with the court.

In a limited interdiction, the judgment specifically lists the duties and responsibilities granted to the curator by the court. For example, an interdiction may be limited as to medical treatment only or it may authorize the curator to manage only certain portions of an individual's estate, (i.e. property) leaving the management of the limited interdict's annual income to the interdict. Any authority not specifically granted to the curator in the judgment of limited interdiction is retained by the interdict.

Most importantly, because the curator is expected to not only encourage the interdict's independence, but to also involve the interdict to the greatest extent possible in all decision-making, the curator must consider the desires of the interdict as expressed both before and after the interdiction, as well as any religious beliefs or other factors that would indicate the wishes of the interdict.

The law also 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 of 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 (10) 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 is of such severity that immediate action is necessary to protect the interests of the defendant. To protect the defendant, the order that grants the temporary interdiction, must also schedule a preliminary interdiction hearing within ten (10) days.

A preliminary interdiction requires a hearing at which the defendant can defend himself and must take place within twenty (20) days of the order that schedules the hearing. The preliminary interdiction may last thirty (30) days, and can be extended for good cause for no more than thirty additional days.

Please note that the law allows a court to appoint two (2) curators to care for an interdict. A court may appoint one curator to care for the interdict and make personal decisions on his behalf, and another curator to manage the interdict's estate.

What is the role of the undercurator?

In addition to a curator, every interdict must have an undercurator. The role of the undercurator is to watch over the curator and ensure that the curator is faithfully and responsibly fulfilling his duties to the interdict. The undercurator has access to all information necessary to ensure that the best interests of the interdict are protected. As “*watchdog*” for the court, the undercurator is charged with the duty to alert the court when the curator is derelict in his duties.

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 the curator is not acting in the best interest of the interdict. In addition, a court may recommend removal of a curator if it appears that removal is in the best interest of the interdict.

In order to determine whether a curator should be removed, the court looks at the following factors: (1) has the curator has been grossly negligent or intentionally embezzled property of the interdict; (2) has the curator failed to submit an accounting of the interdict's property; (3) has the curator failed to obey any order of the court with respect to the performance of his duties as a curator; (4) is there proof of gross misconduct or mismanagement in the performance of the curator's duties; (5) is the curator himself incompetent or incarcerated or in any way incapable of performing his court-appointed duties; (6) is there evidence of abuse (physical or otherwise) of the interdict by the

curator or that the curator has failed to educate the interdict or has failed 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 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. An appeal must be filed within thirty days from the date of the judgment, or the right to appeal is forever lost. The court of appeal reviews the transcript of the interdiction hearing, may hear new evidence, and may 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 files suit for the revocation of his interdiction in his own name.

In a revocation hearing, the court determines whether the conditions necessitating the interdiction have ceased to exist, and whether the interdict is presently 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 liability 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 (18). For example, the law recognizes a parent as the natural tutor of his own child. While a child is under the age of eighteen (18), 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 (18) however, the individual becomes legally responsible for himself and the parent or tutor has no legal authority to act for the eighteen (18) 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 (18), 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 (15) and eighteen (18). 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 (18), 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 246 through 385; and in Title VI of the Louisiana Code of Civil Procedure, articles 4031 through 4557.

Good News & 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 rights are affected by a continuing tutorship?

Based on law prior to 2008:

The Right to Contract. 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 (18), 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.

The Right to Marry. A person subject to a continuing tutorship is not totally barred from marrying, however, he must obtain the permission of the tutor before marrying.

The Right to Vote. 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.

The Right to Sue or be Sued. 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.

The Right to Consent. 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 (18) 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 (15) and eighteen (18), 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 (15). 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 sixty-seven (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, a continuing tutorship may be obtained

before an individual reaches the age of majority and *only* applies to individuals with an intellectual disability. 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 an individual with an intellectual disability 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 Person with an Intellectual Disability*" and is 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 (15) and eighteen (18) 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 (18) 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 (18) 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 (15) and eighteen (18).

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 (18) 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 (15) and eighteen (18); however, such formalities are not required as the child has not yet attained a status of legal competency. At the hearing for the continuing tutorship for a minor, the petitioners need only establish that the defendant possesses less than two-thirds (2/3) of the average mental ability of a person of the same age who does not have an intellectual disability.

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 (18) 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 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 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.

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”)*

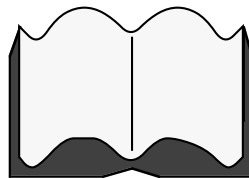
4.1 Procedures and Effects

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 Procuracy, 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 (2) 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/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 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 mandatary 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 ex., 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.

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 or mandatary dies; if 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 procuracy 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 procuracy 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”* in 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 procurement so provides, by the mandatary/agent appointed in the conditional procurement, 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 (rep 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 eighteen (18), benefits are paid to a rep payee; however, there are exceptions. Direct payment will be made to a beneficiary under age eighteen (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 (7) months of age eighteen (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 rep 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 eighteen (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 (18) 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 rep 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 ten (10) days of the event to avoid a penalty. A representative payee should respond to requests for information from SSA within thirty (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 rep 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 rep 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 (2/3) 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 (18) 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 (18) 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 (18), 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?m=d=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)



DISABILITY RIGHTS LOUISIANA

Protect. Advocate. Empower.

Call **TOLL-FREE** 1-800-960-7705

Email info@disabilityrightsla.org

Visit our website: <http://www.disabilityrightsla.org/>

Find us on Facebook: <http://www.facebook.com/disabilityrightsla>

or contact the Disability Rights Louisiana location nearest you.

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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