

HEALTH ED

Louisiana Elder Law 2009

Interdiction

Presented by:

Peter J. Losavio, Jr., JD

Kent S. DeJean

Christopher W. Nielson

Losavio & DeJean, L.L.C.

- I. New Law. The Louisiana legislature completely revised the law of interdiction in the special session of 2000. The new interdiction law took effect, July 1, 2001.
- II. Highlights of New Law
 - A. Stricter time lines.
 - B. More detailed pleading requirement.
 - C. Role of the court appointed attorneys defined.
 - D. "Provisional" interdiction is now "temporary" or "preliminary" interdiction.
 - E. Consideration of less restricted means is required.
 - F. More specific requirements for judgment of interdiction.
 - G. Curators have less liability
- III. The Consequences of Full Interdiction
 - A. Interdiction is a harsh remedy. "A judgment of interdiction is, in the final analysis, a pronouncement of civil death without the dubious advantage of an inscription thereof on a tombstone." *Doll v. Doll*, 156 So.2d 275 (La. App. 4 Cir. 1963).
 - B. The interdict loses his capacity to make a juridical act. This includes a unilateral act such as an affidavit, or a bilateral act such as a contract. The interdict cannot make an act to create, modify, transfer or extinguish rights and obligations, whether real or personal. The interdict loses control over where he will live, how he will spend his money, almost all medical decisions, and virtually every aspect of his life.
- IV. Examples of Less Restrictive Means.
 - A. One defense to a petition for interdiction is that the defendant's interests can be protected by less restrictive means.
 1. Some individuals may be able to maintain autonomy by obtaining services such as: home health services, case management services, Meals on Wheels, help from family/neighbors, community mental health centers, partial/day hospital programs, churches/synagogues, state services such as the Office for Citizens with Developmental Disabilities, the Office of Community Services and the Office of Mental Health. Information about many services is available from the Information Line for Disabilities (1-800-922-DIAL).
 - B. Cases of Abuse and/or Neglect

1. If there is an immediate crisis involving abuse/neglect/self-neglect/exploitation, the adult/elderly protective services agencies may be able to address the crisis without the need to interdict. See R.S.14:403.2.

C. Involuntary treatment/placement

1. Mental and substance abuse.

A. Civil commitment for mental illness or substance abuse. R.S. 28:54-56.

- (1) Addresses situations where an individual needs mental health or substance abuse treatment but is unwilling to go. Unlike interdiction, it is time limited.

a. The grounds for involuntary commitment are: dangerous to self or others and/or gravely disabled "as a result of mental illness or substance abuse."

- (2) A judicial commitment can protect an individual incapable of taking care of his person by providing placement and treatment.

D. Obtaining medical authorization

1. The Medical Consent Law, R.S. 40:1299.50-58, sets forth procedures to obtain medical authorization in a wide variety of situations. R.S. 40:1299.50 et seq.

E. Life sustaining procedures: living wills

1. A living will is a voluntary declaration made by the declarant, authorizing the withholding or withdrawal of life-sustaining procedures. The declarant may also appoint someone to make these decisions.

F. Mandate, procuracy, letters of attorney, and powers of attorney

1. These allow one person to give power to another to transact for him and in his name one or more matters.
2. A Conditional Procuracy ("Springing" Power of Attorney) allows a principal to execute a procuracy which becomes effective only if the principal becomes disabled. A notarized statement by two physicians is required to establish the disability of the principal. R.S. 9:3890

3. Mental Health Advance Directive
 - a. Law allows a principal to execute a declaration and/or appoint a representative for mental health treatment decisions. R.S. 28:221-237.
4. Louisiana Military Power of Attorney Act. R.S. 9:3861 et seq.

G. Finances

1. Establishment of a trust.
2. Alternate payees or benefits
 - a. Curator for receipt and administration of welfare benefits R.S. 46:431.
 - b. Administration of social security funds R.S. 29: 374.
 - c. Administration of other benefits for veterans. R.S. 29: 355.

Interdiction Law

I. Grounds

A. Full Interdiction

1. "A court may order the full interdiction of a natural person of the age of majority or an emancipated minor who due to an infirmity, is unable consistently to make reasoned decisions regarding the care of his person and property, or to communicate those decisions, and whose interest cannot be protected by less restrictive means." C.C. 389
 - a. Functional Disability: The standard for full interdiction focuses on the defendant's capacity to care for himself and his property rather than on labeling the defendant as one suffering from a specific mental or physical disability.
 - b. Limited Interdiction.
 1. Same as the standard for full interdiction except a limited interdiction can be ordered when there is incapacity concerning the "person or property, or any aspect of either." CC 390.

II. Petition

A. Petitioner

1. Any person of age of majority CCP 4541.

B. Contents

1. Detailed requirements: Petitioner's relationship to defendant; place petitioner proposes defendant will reside; reasons why interdiction is necessary, infirmities; if full interdiction is requested, reasons why limited interdiction is inappropriate; if limited interdiction is requested, the capacity sought to be removed from the limited interdict, and the powers sought to be conferred upon the limited curator; name and address of spouse; name and address of adult children, or if none, parents and siblings, or if none, nearest adult relative; name and address of any legal representative of the defendant; name and address of any previous curator; name and address of proposed curator, reasons why proposed curator should be appointed. CCP 4541.

C. Venue

1. Where defendant is domiciled or resides, or if no domicile, then where he is physically present. CCP 4542.

D. Service

1. Personal service on the defendant. If defendant is out of state then delivery of certified copy by anyone over the age of 18. CCP 4543.

E. Notice to Interested Parties

1. Within 3 days of filing petition each person named in the petition must be sent a copy by certified mail. CCP 4543(B).

F. Experts

1. Court may appoint examiner with training or experience in the type of infirmity alleged. CCP 4545.
2. Examiner must send written reports to court, counsel and unrepresented parties seven days prior to hearing. CCP 4545.

G. Wrongful filing of interdiction petition and potential liability

1. If petitioner knew or should have known that any material factual allegation concerning the ability of the defendant to consistently make reasonable decisions or to communicate the decision was false, then liable for damages. CC 399.

III. Temporary Interdiction

A. Grounds

1. "When there is a substantial likelihood that grounds for interdiction exists and substantial harm to the health, safety, or property of the person sought to be interdicted is imminent." CC 391.
2. "When the court finds that immediate and irreparable injury, loss, or damage will result to the person or property of the defendant before a hearing can be held." CCP 4549(A)(1).

B. Pleadings

1. Petition for interdiction must be pending. CC 391.
2. Request for temporary interdiction must be accompanied by:
 - a. An affidavit by a physician or psychologist attesting to facts supporting the claim that all grounds for temporary interdiction set forth in CC 391 exist. CCP 4549(A)(2)(a).
 - b. A verified petition or affidavit attesting to facts supporting the claim that immediate and irreparable injury, loss or damage will result to the person or property of the defendant before he or his attorney can be heard. CCP 4549(A)(2)(b).
 - c. An affidavit by movant or his attorney attesting to efforts made to give notice to the defendant or the reasons supporting a claim that notice should not be required. CCP 4549(A)(2)©.

C. Order

1. May be ordered ex parte, without notice and without an adversarial hearing (somewhat similar to temporary restraining order).
2. In the order of temporary interdiction, the court shall schedule a preliminary interdiction hearing to be held not more than ten days following the ex parte signing of the judgment of temporary interdiction. CCP 4549(A)(1).
3. In the ex parte judgment the court shall appoint an attorney to represent the defendant. The defendant can always choose his own attorney.
CCP 4549 (c) P

D. Termination

1. Ten days after being signed the judgment of temporary interdiction

terminates unless the defendant moves for an extension or unless there are extraordinary reasons shown at a contradictory hearing, in which case it may be extended for another 10 days. CC 397.

- a. The date of termination must be written on the judgment. CCP 4551©.

IV. Preliminary Interdiction

A. Grounds

1. "When there is a substantial likelihood that grounds for interdiction exist and substantial harm to the health, safety, or property of the person sought to be interdicted is imminent." CC 391.

B. Pleadings

1. Petition for interdiction must be pending. CC 391.

C. Service/notice

1. All orders, pleadings, and supporting documents must be personally served on the defendant AND his attorney no later than 72 hours prior to the preliminary interdiction hearing. CCP 4549(B)(2).
2. To the extent possible, petitioner shall give reasonable notice of the hearing to all other persons named in the petition. CCP 4549(B)(2).

D. Hearing

1. The hearing shall be held within 20 days of signing the order scheduling the hearing. CCP 4549(B)(1).
2. In order scheduling hearing, the court shall appoint an attorney to represent the defendant. CCP 4549©.

E. Judgment

1. A preliminary interdiction cannot be granted prior to an adversary hearing. CCP 4549(B)(1).
2. A judgment of preliminary interdiction terminates 30 days after being signed unless extended by the court for good cause for a period not to exceed 30 days. CC 397.

- a. The date of termination must be written on the judgment. CCP 4551©.

V. Hearing on Petition for Interdiction

A. Time of Hearing

1. Interdiction proceedings shall be heard summarily and by preference. CC. 4547.
2. Note: If it's a judgment of preliminary interdiction, the matter should be tried within 60 days of being signed (30 days, post to 30 day extension) to avoid a lapse in the curator's authority. CC 397.

B. Notice of Hearing

1. Notice of the interdiction hearing is served in a manner prescribed for summary proceeding and personal service is required on the defendant, CC. 4546, referring to CC. 4543.
2. Petitioner shall provide notice to each person named in the petition by first-class mail, return receipt requested, at least 10 days prior to the hearing. CC. 4546.

C. Presence of the Defendant and Proposed Curator, Location of Hearing

1. The defendant has the right to be present at the hearing and the court shall not conduct a hearing in its absence unless the court determines that good cause exist to do so. CC. 4547.
2. If the defendant is unable to come to the courthouse, the hearing maybe held where the defendant is located. CC. 4547.

D. Burden and Standard of Proof, Evidence

1. The petitioner has to prove all facts justifying interdiction by clear and convincing evidence. CC. 4548.
2. Usual rules of evidence apply, including healthcare provider privilege. C.E. 510(g).

VI. Legal Counsel

A. Appointment

1. If the defendant makes no timely appearance through an attorney, the petitioner has the responsibility to apply for an order to have an attorney appointed, but the judge can appoint an attorney on his/her own motion. The defendant can always choose his own attorney. CCP 4544.

2. If the court previously appointed counsel in temporary or preliminary interdiction, there's no need to reappoint counsel. CCP 4544 comment (b).

B. Duties

1. The attorney shall personally visit the defendant unless excused by the court for good cause. To the extent possible, the attorney shall discuss the allegations in the petition, the relevant facts and law in rights and options of the defendant. CCP 4544(B).
2. Failure to perform these duties may subject the attorney to sanctions. CCP 4544(B).

VII. Curators

A. Selection of Curator

1. Court chooses person best able to fulfill the duties of his office and considers them in the following order of preference:
 - a. First, a person designated by the defendant in a signed writing, then the spouse, adult child, parent, a person with whom the defendant resided for more than six months prior to the filing, any other person. CCP 4561 (C)(1).
 - b. Never a minor, interdict; or a nonresident of the state without a resident agent for service of process. CCP 4561(B)(1).
 - c. Not the following except for good cause: a felon, a person indebted to the interdict, an adverse party in a pending lawsuit, the owner operator or employee of a long-term care institution where an interdict gives care, unless they are related. CCP 4561 (B)(2).
2. Separate curator for person and affairs is permitted. CCP 4561(C)(2).

B. Appointment and Qualification

1. Appointment in the judgment. CCP 4551.
2. To qualify, the curator must furnish a security and take an oath. CCP 4562(A).
3. If the curator fails to qualify within 10 days of appointment, the court may revoke appointment and appoint someone else or the court may extend the

delay for qualifying. CCP 4562(B).

4. The court may issue protective order to protect the interdict in the interim before appointment of curator. CCP 4562©.

C. Inventory and Security

1. Curator shall furnish security. CCP 4563(A).
2. A detailed descriptive list is permitted in lieu of an inventory. CCP 4563(B).

D. Letters of Curatorship

1. Upon qualification, the court or clerk issues letters of curatorship in the name and under the seal of the court. CCP 4564.
2. Letters must set forth date, if any, of expiration, and enumerate the powers if it is a limited curator. CCP 4564.

E. Standard of Care

1. In discharging his duties, the curator shall exercise reasonable care, diligence and prudence and shall act in the best interest of the interdict. CC 392.

F. Removal

1. Anyone can petition for removal for good cause. CCP 4568.

VI. Undercurator

- A. Court selects person best able to fulfill the duties of office. CCP 4565(A)(1).

- B. If failure to qualify within 10 days, court may revoke appointment or extend the delay for qualifying. CCP 4565(A)(3).

C. Undercurator shall:

1. Notify court when curator fails to qualify timely. CCP 4565(B).
2. Have free access to interdict and interdict's records. CCP 4565(B).
3. Review all accounts and personal reports filed by curator.
4. Notify court when he thinks the curator has failed to perform his duties.
5. Approve or disapprove transactions which require his concurrence.

6. Move to appoint successor when curator's offers is empty.

G. Duty to exercise reasonable care, diligence and prudence, and to act in the best interest of the interdict. CC 393.

VII. Costs and Attorney Fees

A. Costs and attorney fees or any part thereof maybe awarded against any party, except no attorney fees awarded to a petitioner when judgment is granted against the petitioner or the petition is dismissed on the merits. CCP 4550.

VIII. Judgment

A. A judgment of interdiction shall appoint a curator and undercurator and state that their powers commence upon qualification, direct the clerk of court to record the judgment, enumerate the powers if it is a limited curator, and set forth the date of termination if it is a temporary or preliminary interdiction. CCP 4551.

IX. Recordation in Conveyance and Mortgage Records

A. Clerk of court must record notice of filing of interdiction in the mortgage and conveyance records of a parish where the action is pending and must record every judgment granting, modifying or terminating interdiction in the parish where rendered. CCP 4552(A).

B. Curator has 15 days from qualification to record judgment and every parish in which the interdict owns immovable property. CCP 4552(B).

X. Appeals

A. Thirty days from applicable date provided in CCP 2087. CCP 4555.

B. Not suspensive. CCP 4555.

C. Acts of curator and undercurator not invalidated by annulment on appeal. CCP 4555.

XI. Modification or Termination of Interdiction

A. Grounds:

1. The terms of the judgment are currently either excessive or insufficient or the ability of the interdict to care for his own person or property has so changed as to warrant modification or termination. CCP 4554.

B. Standard of proof is preponderance of the evidence. CCP 4554.

C. On motion of the court or any person, including the interdict. CCP 4554.

XII. Effects of Interdiction

A. Pre-interdiction juridical acts

1. Interdiction does not affect the validity of a juridical act made by the interdict prior to the effective date of the interdiction. CC 394.

B. Capacity to make juridical acts

1. A full interdict lacks the capacity to make a juridical act, except as otherwise provided by law. CC 395.
 - a. A juridical act is a lawful volitional act intended to have legal consequences.
2. A limited interdict retains the capacity to make a juridical act, except as otherwise provided by the law, or the judgment of interdiction. CC 395.
3. A person fully interdicted lacks capacity to make donations intervivos and mortis causa. CC 395.

C. Proof of incapacity to donate

1. A person who challenges the capacity of a donor must prove by clear and convincing evidence that the donor lacked capacity at the time the donor made the donation inter vivos or executed a testament. However, if the donor made a donation or executed a testament at the time when he was judicially declared to be mentally infirmed then the proponent of the challenged donation or testament, must prove the capacity of the donor by clear and convincing evidence. CC 1482.

XIII. Post Judgment Monitoring and Reporting

A. A curator for the affairs of the interdict shall file an accounting to the court and to the undercurator annually, upon termination of his office or at any time prescribed by the court. CCP 4569(A).

B. A curator for the person of the interdict shall file a personal report described the location and condition of the interdict annually, upon termination of his office or at any time prescribed by the court. CCP 4569(A).

C. The court may appoint an examiner at the time to review an account or personal report of the curator, to interview the interdict, curator, or undercurator, or to make any other investigation. At any time, the court may appoint an attorney to represent the interdict. CCP 4569(B).

XIV. Management of Affairs of Interdict

- A. Relationship between curator and interdict is the same as between a minor and a tutor, except as otherwise provided. CCP 4566(A).
- B. Curator who owns interest in the property with the interdict may acquire the property in certain circumstances. CCP 4566(B).
- C. Curator may accept donations made to the interdict. CCP 4566 ©.
- D. Curator may place interdict's property in trust. CCP 4566(D).
- E. Curator must notify undercurator reasonably in advance of material changes in living the arrangements and transactions materially affecting the interdict's person or affairs. CCP 4566(E).
- F. Curator shall not move the dwelling of the interdict out of the state without prior court authorization. CCP 4566(F) F.
- G. Curator cannot consent to the abortion or sterilization without prior court approval. CCP 4566(G).
- H. Curator and court cannot admit or commit to a mental health treatment facility except by using mental health laws. CCP 4566(H).
- I. A temporary curator cannot place the defendant in a residential or long-term care facility (such as a nursing home) without a good cause shown at a contradictory hearing. CCP 4566(I).

XV. Expenses of the Interdict and Legal Dependent

- A. Curator shall expend enough revenue to care properly for the interdict's person or affairs, or (with court authorization) to support his legal dependents. CCP 4567.
- B. If revenue is insufficient, then capital, with court authorization. CCP 4567.

XVI. Liability

- A. Neither a curator nor an undercurator is personally responsible to a third person for a delictual obligation of the interdict in his charge solely by reason of his office. CCP 2319.
- B. Wrongful filing of Interdiction suit. If petitioner knew or should have known that any material factual allegation concerning the ability of the defendant to consistently make reasonable decisions or to communicate the decision was false, then liable for

damages. CC 399.

XVII. Effective Date of Interdiction and Effective of Interdiction on Acts Prior to Interdiction

- A. Retroactive to date of filing. CC 396.
- B. Interdiction does not affect the validity of a juridical act made by the interdict prior to the effective date of interdiction. CC 394.