



THE "NUTS & BOLTS"

Interdiction 101

By Kevin Robshaw

A judgment of full interdiction is, in some ways, the most far-reaching legal judgment short of the death penalty. Indeed, it is often referred to as "civil death."¹ A full interdict loses control of virtually every aspect of his life, including decisions about place of residence,² medical care,³ financial affairs and the authority to donate property *inter vivos* or *mortis causa*.⁴ He also loses control over family law matters, such as child custody and marriage.⁵ It is by no means a decision to be made lightly, nor should a judgment of interdiction be rendered when less severe means would suffice.

If the defendant in an interdiction suit is not personally served, the court is precluded from granting the relief sought in the petition.⁶ Even so, some petitions for interdiction filed in Louisiana since a revision of the interdiction laws took effect on July 1, 2001 have no proof of personal service. Indeed, in at least one case, service instructions stated, "Defendant not competent to receive service!"⁷ The new law sets forth other requirements and duties for attorneys which merit review.

Failure to follow the requirements of the law

compromises its fundamental purpose, namely, the protection of vulnerable persons.⁸ A defective judgment of interdiction also has the potential to create serious legal problems.⁹ In addition to the potential harm suffered by persons wrongfully interdicted, the bar and judiciary run the risk of public censure as the population ages and stories emerge about elderly and disabled persons wrongfully removed from their homes and losing control of their life savings.

The grounds for interdiction require that the "interests of the proposed interdict cannot be protected by less restrictive means."¹⁰ Some less restrictive alternatives to interdiction include procuratorships, mandates and advance directives. For financial matters, an alternative payee may be designated¹¹ or a trust established. The medical consent law¹² is helpful when medical authorization is necessary. Involuntary commitment for mental health or substance abuse treatment,¹³ or for developmental disabilities services,¹⁴ may be an option. A limited, rather than full, interdiction may be all that is warranted. If the court determines that less restrictive means can protect the

defendant's interests, the court should deny full interdiction.¹⁵

The following "skinny" is designed to help point counsel unfamiliar with interdiction laws in the right direction. A more detailed outline, including sample forms, is available online at the Louisiana State Bar Association's Web site.¹⁶

► **The petition must be detailed, verified and personally served.**

A list of the information that must be included in the verified petition is found in La. C.C.P. art. 4541. The petition must include, among other things, the names and addresses of certain relatives, and it must be personally served on the defendant.¹⁷ An attorney cannot accept service for the defendant.¹⁸ Notice shall be provided to each other person named in the petition.¹⁹

► **Grounds for full and limited interdiction and consideration of less restrictive means.**

A court may order full interdiction when a person:

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 interests cannot be protected by less restrictive means.²⁰

The standard for limited interdiction is identical, except a limited interdiction can be ordered when there is incapacity concerning the "person or property, or any aspect of either."²¹

► **Temporary interdiction terminates after 10 days.**

Temporary interdiction is an *ex parte* emergency procedure similar to a TRO.²² The court must find that there will be irreparable harm before a hearing can be held.²³ It may be ordered when there is a substantial likelihood that the grounds for interdiction exist and substantial harm to the health, safety or property of the interdict is imminent.²⁴ The petitioner must file two affidavits

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and a verified petition or affidavit.²⁵ A petition for interdiction must be pending.²⁶ The order must schedule a preliminary hearing within 10 days.²⁷

A judgment of temporary interdiction terminates 10 days after it is signed;²⁸ the date of termination must be written on the judgment.²⁹ There may be a 10-day extension under limited circumstances.³⁰

► **Preliminary interdiction terminates after 30 days.**

A preliminary interdiction is similar to a preliminary injunction. A preliminary interdiction cannot be granted prior to an adversary hearing.³¹ The hearing shall be held within 20 days of signing the order scheduling the hearing.³²

It may be ordered when there is a sub-

stantial likelihood that the grounds for interdiction exist and that substantial harm to the health, safety or property of the person sought to be interdicted is imminent.³³

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.³⁴ To the extent possible, petitioner shall give reasonable notice of the hearing to all other persons named in the petition.³⁵

A judgment of preliminary interdiction terminates 30 days after being signed, unless extended for not more than another 30 days;³⁶ the date of termination must be written on the judgment.³⁷

► **Attorney duties, sanctions and fees.**

The attorney shall personally visit the defendant,³⁸ and, to the extent possible, discuss the allegations in the petition, the relevant facts and law, and the rights and options of the defendant. Failure to perform these duties may subject the attorney to sanctions.³⁹

Costs and attorney fees, or any part thereof, may be awarded against any party, except that no attorney fees are awarded to a petitioner when judgment is granted against the petitioner or the petition is dismissed on the merits.⁴⁰

► **Hearings.**

Interdiction proceedings shall be heard summarily and by preference.⁴¹

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Notice of the interdiction hearing is served in the manner prescribed for summary proceedings, and personal service is required on the defendant.⁴² Notice must be given to each other person named in the petition by first class mail, return receipt requested, at least 10 days prior to the hearing.⁴³

The defendant shall be present at the hearing, except for good cause.⁴⁴ The petitioner has the burden of proof by clear and convincing evidence.⁴⁵

► Judgment.

A judgment of interdiction shall appoint a curator and undercurator and state that their powers commence only 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.⁴⁶

► Curator and undercurator, letters of curatorship, annual reports and liability.

The court chooses the best person to be curator according to an order of preference.⁴⁷ "Letters of Curatorship" are issued when the curator furnishes security and takes an oath.⁴⁸ The "letters" must set forth the date, if any, of expiration, and enumerate the powers if it is a limited curator.⁴⁹ The curator should, within 15 days, record the judgment in every parish in which the interdict owns immovable property,⁵⁰ and is responsible for filing an annual account and/or report and providing a copy to the undercurator.⁵¹

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.⁵²

The court selects the person best able to be undercurator,⁵³ who qualifies upon taking an oath.⁵⁴

FOOTNOTES

1. Doll v. Doll, 156 So.2d 275 (La. App. 4 Cir. 1963), cited in William Reed Huguet, "The New Law of Interdiction — Clear and Convincing Revision?," 47 Loy. L. Rev. 1059, 1070 (2001).

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2. *But see* La. C.C.P. art. 4566(I). A temporary curator appointed *ex parte* does not have authority to place the interdict in a long-term residential care facility until after a hearing.

3. La. R.S. 40:1299.53.

4. La. Civ.C. art. 395, as amended, 2003 La. Acts 1008; La. C.C.P. art. 1482, as amended, 2003 La. Acts 1008.

5. *See, e.g.*, La. Civ.C. art. 395, *Comment* (4).

6. La. C.C.P. art. 4543(A).

(Service of the citation and petition shall be personal . . . Service is effective as of the date a notarized affidavit is filed into the record affirming personal delivery. Failure to serve the defendant as provided in this Paragraph shall preclude the court from granting the relief sought in the petition.)

7. *Id.* Research performed by Mental Health Advocacy Service attorneys, to help ensure that the rights of persons with mental disabilities are protected, La. R.S. 28:2(13).

8. Jeanne Louise Carrier, "Reconstructing the Grounds for Interdiction," 54 La. L. Rev. 1199 (1994).

9. Consider, for example, title to real property that has passed through the hands of a curator appointed in an interdiction proceeding in which the defendant was never personally served.

10. La. Civ.C. art. 389.

11. *See, e.g.*, La. R.S. 46:431.

12. La. R.S. 40:1299.50, *et seq.*

13. La. R.S. 28:2, *et seq.*

14. *See* La. R.S. 28:404.

15. *See* La. Civ.C. art. 389, *Comment* (e).

16. http://www.lsbda.org/Bar_Information/Interdiction_Reference_Materials.pdf

17. La. C.C.P. art. 4543(A).

18. *See* La. C.C.P. art. 4544, *Comment* (c).

19. La. C.C.P. art. 4546.

20. La. Civ.C. art. 389.

21. La. Civ.C. art. 390.

22. *See* La. C.C.P. art. 4549, *Comment* (a).

23. La. C.C.P. art. 4549(A)(1).

24. La. Civ.C. art. 391.

25. La. C.C.P. art. 4549(A)(2).

26. La. Civ.C. art. 391.

27. La. C.C.P. art. 4549(A)(1).

28. La. Civ.C. art. 397.

29. La. C.C.P. art. 4551(C).

30. La. Civ.C. art. 397.

31. La. C.C.P. art. 4549(B)(1).

32. *Id.*

33. La. Civ.C. art. 391.

34. La. C.C.P. art. 4549(B)(2).

35. *Id.*

36. La. Civ.C. art. 397.

37. La. C.C.P. art. 4551(C).

38. Unless excused by the court for good cause, La. C.C.P. art. 4544(B).

39. *Id.*

40. La. C.C.P. art. 4550.

41. La. C.C.P. art. 4547.

42. La. C.C.P. art. 4546, referring to La. C.C.P. art. 4543(A).

43. La. C.C.P. art. 4546.

44. La. C.C.P. art. 4547.

45. La. C.C.P. art. 4548.

46. La. C.C.P. art. 4551.

47. La. C.C.P. art. 4561.

48. La. C.C.P. arts. 4562-4564.

49. La. C.C.P. art. 4564.

50. La. C.C.P. art. 4552(B).

51. La. C.C.P. art. 4569 (A).

52. La. Civ.C. art. 2319.

53. La. C.C.P. art. 4565(A)(1).

54. La. C.C.P. art. 4565(A)(1). The duties of the undercurator are set forth in La. C.C.P. art. 4565(B) and La. Civ.C. art. 393.

ABOUT THE AUTHOR

Kevin Robshaw directs the Mental Health Advocacy Service, an agency which provides legal representation for children and adults being civilly committed and helps ensure their legal rights are protected. He is a member of the Legal Services for Persons with Disabilities Committee and Elder Law Task Force of the Louisiana State Bar Association. He serves on the Interdiction Committee of the Louisiana Law Institute and provided testimony on various interdiction bills in the Louisiana Legislature. He received his JD degree from Tulane Law School in 1977. (St. 812, 150 Third St., Baton Rouge, LA 70801)

