

## **THE MANDATE given in anticipation of incapacity to guarantee that your wishes will be respected**

### **It can HAPPEN to anyone**

The prospect of losing the ability to decide for oneself is not a pleasant one. Yet, none of us can be sure of being spared a serious accident or disease which might deprive us of our mental faculties.

### **IF SUCH AN UNFORTUNATE EVENT OCCURRED, WHO WOULD LOOK AFTER YOU AND YOUR PROPERTY OR ASSETS?**

It is difficult for independent, lucid and healthy people to imagine that one day they might be incapable of such routine tasks as making out a rent cheque, doing their shopping or making a dentist's appointment. And yet...

### **PROTECTIVE SUPERVISION**

The court may, on a motion, institute or review protective supervision.

An application for the institution or review of protective supervision may also be presented to a notary who has been specially certified by his professional order. The notary follows the procedure established by law, draws up notarial minutes of operations and conclusions and deposits an authentic copy at the office of the court. The conclusions set out in the minutes must be confirmed by judgment.

The type of protective supervision determines the nature and scope of the moral and material protection that will surround the incapable person of full age. A person is appointed to represent or assist him. Depending on the degree of incapacity, protective supervision may be in the form of a curatorship, tutorship or advisership. Whatever the nature of the supervision, it must be periodically reviewed according to law.

The court also determines the appropriate degree of protection, depending on the needs of the person: adviser to a person of full age, tutor to a person of full age, or curator.

Do you know who would be appointed to represent or assist you? What type of protective supervision would be instituted? Wouldn't you rather decide for yourself?

### **THE MANDATE GIVEN IN ANTICIPATION OF INCAPACITY**

Fortunately, people nowadays may themselves determine who will take care of them and their property should they become incapacitated. The law allows any person of sound mind, the mandator, to appoint, in a document called "mandate in anticipation of incapacity", the person who will ensure his or her well-being and the administration of his or her property or assets in the case of incapacity. The person entrusted with this task is known as the "mandatary".

It is a great relief to know that a trustworthy, freely chosen person, such as one's own spouse, brother, sister or close friend, will then be legally empowered to make vital decisions.

### **WHAT IS THE PROCEDURE?**

To be truly effective, the mandate must be as complete and unambiguous as possible, give wide-ranging power to the mandatary and provide for the mandatary's replacement should the latter resign, become incapable of acting, or die. If you wish, you may even choose two different persons, one to ensure your well-being and the other to take care of your property. The mandate may even include certain "living will" provisions or provisions to ensure the gift of bodily organs, etc.

Ideally, the mandate should be drawn up before a notary. This enables the mandator to obtain complete information and advice from a legal authority concerning the usefulness and consequences of a mandate, when and how it comes into force, etc. The mandate may also take the form of a simple contract, signed under private signature before two disinterested witnesses. The witnesses must also be in a position to assess the capacity of the mandator at the time of signature.

However, a notarial mandate provides greater security because it is difficult to contest. The notary ensures that the person who signs the mandate understands its scope and significance and is in full command of his or her faculties. Mandators and mandataries may obtain as many copies as they need, since the original is kept for safekeeping by the notary in whose presence it was signed.

### **THE REGISTER OF MANDATES GIVEN IN ANTICIPATION OF INCAPACITY: MORE PROTECTION**

Quebec notaries have access to a centralized registration system to ensure that all mandates are easily traced, thus guaranteeing that your wishes will be respected. Once you have signed your mandate before a notary, he or she will see that it is entered in the Register of Mandates Given in Anticipation of Incapacity kept by the Chambre des notaires du Québec.

This system offers the following advantages:

- Any notarial mandate can be located
- Your last notarial mandate can be identified
- The risk, following incapacity, of a mandate's being disregarded or belatedly traced is eliminated

### **WHAT HAPPENS IF YOU CHANGE YOUR MIND?**

In time, situations change. The person chosen while the mandator was a young adult may not be considered suitable in later years. It is comforting to know that any mandate may be revoked and another one drawn up any time.

## **EXECUTION OF THE MANDATE**

If you become incapable, your mandatary must ensure that the mandate becomes effective. This means proving your incapacity by means of a medical, psychological and social assessment, and establishing that your consent to the mandate is valid. The mandatary may do this by applying directly to the court for homologation of the mandate or, more simply, by presenting an application to a notary who has been specially certified by his or her professional order.

The notary will follow the procedure established by law, draw up the minutes of notarial operations and conclusions, and deposit them at the office of the court. The conclusions of the minutes must be confirmed by the court. Only after the mandatary has obtained a judgment of homologation or a judgment confirming the notarial minutes will he or she be able to assume the role of mandatary and become your legal protector and representative. The mandate ceases to have effect when the court ascertains that the mandator has again become capable.

As soon as the mandate has been homologated by the court, the mandatary becomes your legal protector and representative.

## **DUTIES OF THE MANDATARY**

The mandatary takes on very important duties and responsibilities, which may include giving or withholding consent to health-care procedures and medical treatment. He or she may:

- Accept or refuse treatment
- Accept or refuse surgery
- Etc.

He or she will also administer your property, which means:

- Looking after your investments:
- Paying your bills
- Collecting your income
- Filing your tax returns
- Etc.

He or she must also look after your physical well-being, by:

- Buying your clothes:
- Seeing to your recreational activities
- Etc.

The mandatary may not resign until a satisfactory replacement mandatary has been found (if the mandate provides for the possibility of replacing a resigning mandatary by someone else) or until protective supervision has been applied for. He or she must also render an account of his or her administration.

## WHO BENEFITS?

New lifestyles, the emergence of reconstituted families, longer life expectancy, and the estrangement of family members are some of the arguments in favour of appointing, in advance, a mandatory in anticipation of incapacity.

Although the opportunity presents advantages for everyone, those who stand to benefit the most are:

- *De facto* spouses
- Couples separated but not legally divorced
- People who have little or no contact with other members of their families
- People engaged in business
- Etc.

**Do not delay: the mandate in anticipation of incapacity is your guarantee of peace of mind.**

Registres des dispositions testamentaires et  
des mandats donnés en prévision de l'inaptitude  
Chambre des notaires du Québec  
600-1801, McGill College  
Montreal Que H3A 0A7

[registres@cdnq.org](mailto:registres@cdnq.org)

**Consult your notary: he leaves nothing to chance.**



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