

A Close Relative or Friend Becomes Incapacitated

How Can You Protect
Them?



**Le Curateur public
du Québec**

À la rencontre de la personne

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Your mother is showing
symptoms of Alzheimer's

Your brother had a head
injury and can no longer
manage his affairs

Your sister's mental health
is deteriorating

When a loved one can no longer take care of themselves or manage their affairs due to illness, accident or age-related loss of autonomy, what can you do to help them?

You must, above all, consider the welfare and safety of the person who has become vulnerable.

The following explanations apply to anyone close to you who is starting to experience behavioural or health problems that are impeding their ability to make decisions and manage their affairs.

WHAT IS INCAPACITY?

A person is **incapable** when they are unable to care for themselves or manage their affairs.

Incapacity may be declared due to a mental or degenerative illness, stroke, intellectual disability, head injury or weakened state as a result of old age that alters the mental faculties or physical ability to express one's wishes.

WHAT IS MEANT BY NEED FOR PROTECTION?

Under the law, the need for protection exists when an incapacitated person must be assisted or represented in the exercise of their civil rights. This need may arise from the person's isolation, the duration of their incapacity, the nature or state of the person's affairs, etc.

THE EXISTING MEANS OF REPRESENTATION

In the case of a person who receives regular visits from family and friends, who is not at risk of becoming a victim of abuse, and has few assets to be administered (for example, their income consists solely of government pensions), it is unnecessary to institute protective supervision. Instead, one of the regular means of representation may be employed.

Those close to the person may arrange to help them if they are still living at home. If the person is unable to continue living at home and agrees to go to a nursing home or long-term care centre, family or friends can help them choose a new residence that corresponds to their needs and income.

If the person is unable to consent to the care required by their condition, their spouse, a close relative or someone who expresses special concern for them may do so on their behalf, without the need for protective supervision.

◆ *Domestic Mandate*

When a couple is married or in a civil union, the two spouses can establish a domestic mandate. This agreement vests a spouse with the authority and moral obligation to assume responsibility for the daily needs of the family when the other spouse can no longer express their wishes. It is not a court certified document but rather a responsibility assumed by each spouse. It allows someone whose spouse has become incapacitated to assume responsibility, on their behalf, for regular family needs and unforeseen necessities of life (food, health care, housing, furniture, electricity, heat, etc.). Note that the domestic mandate does not apply to common-law couples.

◆ *Power of Attorney*

A power of attorney gives someone the power to act on another person's behalf in certain matters such as the payment of bills and cashing of cheques. However, someone who is being represented in this way must be able to check that these actions comply with their wishes. A banking institution may refuse to recognize a power of attorney for someone who has been declared incapable.

◆ *Administration by a Third Person*

A family member may receive pension cheques and other compensation or payments on behalf of someone that a physician has assessed as being incapable, and administer them on their behalf. This is called administration by a third person. The close relative or friend must make any necessary arrangements with the relevant government agencies.



When it Becomes Necessary to Go to Court

THE FIRST STEPS

The first thing you must do is inform other family members and friends of the person's vulnerable state and try to come to an agreement about the steps to take. The person concerned should be involved in the process to the extent that this is possible.

Next, you must contact the health and social services centre (CSSS) for the territory in which the person resides. They will assist you in having the person examined, and, if necessary, obtaining medical and psychosocial assessments confirming the person's incapacity and need for protection. The family physician and the CSSS are the best resources to consult if the person is still living at home. If they live in a residential care centre or are hospitalized, the attending physician and a professional from the institution will conduct the required assessments.

DETERMINING INCAPACITY AND THE NEED FOR PROTECTION

◆ Medical and Psychosocial Assessments

It is compulsory to obtain a medical and psychosocial assessment to determine a person's state of incapacity.

The medical assessment is conducted by a physician, either a specialist or a generalist. He or she examines the person to determine the cause, degree and duration of incapacity.

The psychosocial assessment is usually conducted by a social worker. This individual will meet with the incapacitated person, their family and anyone else who might assist in establishing the person's degree of independence and need for protection. The social worker considers the possibility of implementing measures that will meet the person's needs without the need for a legal arrangement. Caregiving by close relatives or friends is the preferred solution. They are in the best position to play this role since they, more than anyone else, are aware of the incapable person's needs.

◆ Adapting the Form of Protection to the Person's Needs

What should you do if medical and psychosocial assessments demonstrate that your father or brother is no longer able to care for himself and manage his affairs, but that the regular methods of representation are insufficient?

LEGAL PROTECTION MEASURES

MANDATE IN CASE OF INCAPACITY

While they are still able to decide for themselves, people can prepare a **mandate in case of incapacity** in which they appoint someone to look after their property and their person. The existence of this document should be known by the appointed individual (known as the **mandatary**), the incapable person's notary (if made before a notary), or two witnesses, if the mandate was prepared by the person themselves (the mandator).

Procedure for Validating a Mandate

Have you been appointed to act as a mandatary? If so, you must go to the courthouse in the judicial district in which the incapable person resides and file a motion to **homologate**, for the purpose of validating the mandate. The motion includes a copy of the mandate and the medical and psychosocial assessments establishing the mandator's state of incapacity. Due to the complexity of this procedure, we suggest that you appoint a legal counsellor—a notary or a lawyer—to handle this for you. There will be charges for filing documents with the court and fees for the notary or lawyer, all of which are covered by the incapable person. If the mandator is eligible, these charges may be covered by legal aid. The fees will be reimbursed based on the mandator's income.

Responsibilities of the Mandatary

Once the mandate has been authorized by the court, you must respect the wishes contained in it by ensuring the welfare of the incapable person and taking care of their property.

Depending on what the person you are responsible for has specified, you will be the sole mandatary for their person and property, or you will share this responsibility with someone else. Whatever the case, and even if it was not specified in the mandate, it is strongly recommended that you make an inventory of the property of the person under your protection as of the date on which the mandate becomes effective, open a separate account to administer their assets, and keep all invoices for the final report.

FORMS OF PROTECTIVE SUPERVISION

If an incapable person has not prepared a mandate, or if the mandate they prepare cannot be homologated, but their condition or financial situation demands that a **legal representative** be appointed, the *Civil Code of Québec* has provided other measures to enable this to happen. These measures differ according to the seriousness of the incapacity and whether it is permanent or temporary in nature.

Advisor to a Person of Full Age

This form of protection is adapted to the needs of a person suffering from mild intellectual impairment or a temporary disability caused by an illness or accident. The person is able to care for themselves, but can be overwhelmed by the prospect of having to make certain decisions. With this form of protection, the person remains independent and continues to exercise their **civil rights**, including managing their income and voting. As an **advisor to a person of full age**, you are called on to assist them with certain things, usually in relation to managing their affairs. Because you are not a legal representative, you will not be required to prepare an inventory of the person's property or submit annual reports.

Tutorship

Tutorship is proposed for a person who is partially or temporarily incapacitated. An incapable person benefiting from tutorship can perform certain actions on their own (e.g., deciding how to spend their income) or be assisted by their tutor. The tutor represents them when it comes to making other decisions. The scope of a tutor's responsibility is determined by the court, following the recommendation of a meeting of family and friends or in conformity with the *Civil Code of Québec*. If you have been appointed as **tutor**, you will have the responsibility of looking after the person, or managing their property, for which you will exercise simple administration, or you will be responsible for both.

Curatorship

Curatorship is applicable when a person is totally and permanently incapable of caring for themselves and managing their affairs. A curator to a person of full age is appointed by the court following the recommendation of a meeting of family and friends. After being appointed **curator**, you will represent the incapable person with respect to all of their actions covered under civil law. You may be appointed to care for the person, or to administer their property, for which you will exercise full administration, or both.

PROCEDURE FOR INSTITUTING PROTECTIVE SUPERVISION

Go to the courthouse to apply for the institution of **protective supervision**.

Medical and psychosocial assessments constitute the basis for instituting protective supervision. Once you have obtained these documents, either you or someone who is close to the incapable person can present the application. However, due to the complexity of this procedure, we suggest that you appoint a legal counsellor— notary or lawyer—to handle this for you.

At this stage, the person who is undertaking the procedure has a bailiff deliver the application to the incapable person, a member of their family and the Curateur public. This is what is known as "serving the motion." It is also at this stage that the Superior Court will open a file and the required documents are filed with the Clerk; these include the birth certificate and medical and psychosocial assessments of the incapable person.



The **Clerk** or a certified notary will then meet with the incapable person to hear their opinion about the institution of protective supervision and to confirm their condition. Following this, a **meeting of relatives, persons connected by marriage or a civil union and friends** will be called so that everyone can give their opinion about the form of protective supervision that will be most appropriate to protect the incapable person, the person who should represent them, and the individuals who should constitute the **tutorship council**.

On the recommendation of the meeting of family and friends, the judge or the clerk will appoint a legal representative: a tutor or curator. This individual, the incapable person and the Curateur public will then be sent a copy of the judgment.

Note that protective supervision terminates upon the death of the incapable person (the legal representative must furnish a report of their administration to the heirs) or when new medical and psychosocial assessments establish that the person has become capable again. If you are their legal representative, you must submit a final report of your administration to the person who has become capable again or to the liquidator of their succession. The report must also be sent to the tutorship council and the Curateur public.

HANDLING URGENT MATTERS WHILE WAITING FOR THE JUDGMENT

Naturally, it takes more than 24 hours to validate a mandate or institute protective supervision in the form of a tutorship or curatorship; you can expect a wait of several months between the application to the court and the judgment. During this time, who protects the person who has become incapable?

The law has provided for two ways to proceed while waiting for the **judgment**: management of the business and provisional administration.

Management of the Business

Management of the business entitles you to take action to preserve an asset in an emergency situation. For instance, you can take the initiative to repair the roof of the incapable person's house if it is leaking, or perform emergency plumbing work in a building they own. It is advisable to notify other family members before commencing this work and to keep invoices so that the legal representative can reimburse you once they have been appointed.

Provisional Administration

If there is a need for emergency action at the same time as you are applying to the court for the institution of a tutorship or curatorship or to homologate a mandate, you can apply for **provisional administration**. This gives you certain powers during the waiting period before the court renders its decision on the type of protective supervision most appropriate to the incapable person's situation. Once you are appointed provisional administrator, you can collect rent or hire someone to take care of the person in their home. These costs will be covered by the person's patrimony.

Whether a relative is provisional administrator, tutor, curator or mandatary, they are not responsible for any harmful actions committed by the incapable person, unless the act is a direct result of serious negligence on their part.

REASSESSMENT OF PROTECTIVE SUPERVISION

What if the condition of the incapable person improves or deteriorates? The legal representative (tutor or curator) or the advisor to a person of full age may ask, at any time, for a **review** of the type of protective supervision, in accordance with changes of the protected person's state of health. Under the law, the representative has the obligation of obtaining a medical and psychosocial reassessment every three years, if they are a tutor or advisor, and every five years, if they are a curator. Depending on the person's degree of incapacity and need for protection, the protection measure may be maintained, changed to a measure that is better adapted to the person's situation, or cancelled, if the person has become capable again or if the need for protection is no longer present. A mandatary who has become capable again can also apply for the **revocation** of their mandate.

MORE THAN ONE PERSON CAN PROTECT AN INCAPABLE PERSON

When a vulnerable person is under tutorship or curatorship, the *Civil Code of Québec* distinguishes between their personal protection and the protection of their property. The court can therefore appoint a tutor or curator who will be responsible for only one of these aspects, or for both. The law makes the same distinction in the case of a person benefiting from a mandate: one mandatary can look after their welfare and another (for example, a trust company) can manage their property.

◆ What Does Protecting the Person Mean?

This means ensuring that their living conditions (housing, food, clothing, care, safety) are satisfactory, considering their state of health and income. It also means visiting them regularly, ensuring that their living environment meets their needs, having the form of protective supervision reassessed in accordance with the law, ensuring the protection of their rights, keeping informed about changes in the administration of their property when another person is responsible for this aspect, etc.

◆ What Does Administering Property Mean?

Regardless of the protective measure in effect, tutors, curators and mandataries to the property should be guided in their administration by one basic principle: to act with prudence, diligence, honesty and loyalty and always in the best interests of the incapable person. If you agree to be appointed as tutor or curator to the property, you must report on your administration by submitting an annual report and a final report of your administration.

Private tutors and curators are not remunerated, unless they make a request to the court at the time of the application to institute protective supervision, or at a later date, and receive the assent of the judge or clerk.

◆ Tutorship Council

The tutorship council assists private tutors and curators in their role as legal representative. It is most frequently composed of three individuals named by the court on the recommendation of the meeting of family and friends.

The tutorship council ensures that the tutor or curator accomplishes their tasks and makes sound decisions. It must also monitor the administration and assist the representative in carrying out their duties. It authorizes certain actions, such as the sale of property belonging to the protected person, and gives its opinion to the court under specific circumstances stipulated by the law. Further, it is the tutorship council's responsibility to ask the court to replace the tutor or curator if this person can no longer exercise this function, in the event of their death, or if they do not fulfill their obligations.

◆ The Curateur public

In addition to the tutorship council, you can count on the Curateur public for assistance.

The Curateur public supplies information to legal representatives and assists them in carrying out their responsibilities. This collaborative effort is preventive in nature, because the Curateur public is legally obligated to monitor legal representatives' actions and administration and intervene in cases of abuse. In establishing ties with legal representatives and tutorship councils, the Curateur public is striving to protect the interests of incapable individuals, a principle that is central to all legal protection measures.

It may happen that, due to the circumstances of your life, you are unable to care for an incapable person or administer their property.

The Curateur public could then be asked to adopt a provisional administrator function, and act as tutor or curator. The Superior Court may decide to take this measure if the family cannot agree on the choice of a representative or if the person is isolated, with no family or friends that can assume this role. If a judge appoints it to act as legal representative, the Curateur public will ensure the protection of the person and their interests. It will ensure the person's safety and safeguard their rights and autonomy. To do so, it will charge a fee, to be paid out of the represented person's patrimony. The Curateur public may renounce the fee under certain circumstances related to the financial situation of the persons it represents.

RECOURSE IN CASES OF ABUSE OR MISTREATMENT

The Curateur public has the power to intervene, investigate and protect incapable persons who are the victims of abuse or mistreatment. Anyone with knowledge of the abusive treatment of an incapable person, or who witnesses a situation involving a person who requires protection can call the Curateur public and file a confidential report.

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GLOSSARY

Administration by a third person: management of the property of an incapable person by a relative or close friend. This can also be carried out by an insurer or governmental agency that assigns an individual or health institution to administer the capital, compensation and benefits paid to the person.

Advisor to a person of full age: protection measure for a person who usually is able to perform daily tasks but needs the advice of another person to execute more complicated administrative tasks. The advisor to a person of full age is not a legal representative and cannot act in the name of the represented person.

Application to institute protective supervision: method of addressing the court to request the institution of protective supervision, according to procedural rules.

Civil rights: rights related to the respect of privacy and family, home, correspondence, public image, freedom, security, freedom of movement, freedom of thought, conscience and religion, freedom of expression, association and assembly, right to marriage and have children.

Clerk: court officer who performs administrative and judicial duties, for example at the Superior Court.

CSSS: French acronym for health and social services centre that provides health and social services to the public in different facilities including hospitals, CLSCs and long-term care centres in its territory.

Curateur public: body appointed by the Government of Québec, which, with its partners, protects the rights and property of incapable persons who are isolated or whose family and friends are unable to take care of them. This agency assists and supervises private curators and tutors.

Curator: legal representative appointed to look after the person or the property of a person who has been declared totally and permanently incapable.

Curatorship: a protection measure for persons who have been recognized as totally and permanently incapable.

Domestic mandate: for couples recognized by marriage or a civil union, when one spouse becomes incapacitated, the other spouse is legally authorized to provide for the family's daily needs and meet any unforeseen obligations.

Homologation: judicial procedure to recognize that a person is incapable, that their mandate in case of incapacity is valid and that their mandatary can begin to exercise their responsibilities.

Incapable: describes a person who is unable to care for themselves or manage their affairs. Incapacity may be declared due to a mental or degenerative illness, stroke, intellectual disability, head injury or weakened state as a result of old age that alters the mental faculties or physical ability to express one's wishes.

Judgment: court document that sets out the nature and conditions of protective supervision and the names of the legal representative and members of the tutorship council.

Legal representative: mandatary, tutor or curator; in other words, the individual named in a judgment of the Superior Court to ensure the exercise of the civil rights of a person who is benefiting from one of various forms of protective supervision, depending on the extent of their incapacity or the content of their mandate. It generally involves administering the property, ensuring that the person is accommodated in a living environment appropriate to their condition and needs, protecting their interests, and, when applicable, consenting to care on the person's behalf.

Management of the business: legal principle that makes it possible to act in an emergency to safeguard the property of a person, regardless of whether they are known to you.

Mandatory: person designated in a mandate to look after the mandator (person who signed the mandate) or in some cases, their property.

Mandate in case of incapacity: document by which the mandator gives another person (mandatary) the power to take care of them or take care of their property, depending on what has been specified in the mandate, should they become incapacitated.

Medical and psychosocial assessments: assessments performed by health and social services professionals to determine if a person is incapable and in need of a protection measure; and to select the most appropriate type of protective supervision and the individual capable of carrying out such a responsibility.

Meeting of relatives, persons connected by marriage or civil union and friends (meeting of family and friends): meeting of immediate family, in-laws (brother-in-law, sister-in-law, etc.) and friends who are consulted about the choice of a protection measure and legal representative and about the composition of the tutorship council.

Power of attorney: document that gives someone the power to act on behalf of another person under specific circumstances. The person who gives power of attorney must be capable of monitoring the execution of the actions that have been specified under this agreement. This measure is often used for the payment of bills and cashing of cheques.

Protection measures: rules aimed at ensuring the exercise of the rights and the organization of the administration of the patrimony of individuals who are not fully capable of doing this for themselves and who need protection, the nature of which varies depending on the degree of their incapacity. These measures include the mandate in case of incapacity, provisional administration, and three forms of protective supervision: advisor to a person full age, tutorship and curatorship.

Protective supervision: term that applies to curatorship, tutorship and advisor to a person of full age.

Provisional administration: power to protect or administer the property of an incapable person accorded by the court during the waiting period before its judgment concerning a protection measure and the appointment of a legal representative, or the homologation of a mandate in case of incapacity.

Reassessment: examination of the state of health, environment and living conditions of an incapable person to determine whether it is appropriate to maintain or change the form of protective supervision, or to terminate it.

Review: judicial procedure to change the existing form of protective supervision or terminate it.

Revocation: legal act of a mandator who is no longer incapable to cancel the mandate he or she had given.

Tutor: legal representative appointed to take care of a person who is partially or temporarily incapable of caring for themselves or administering their property.

Tutorship: protective supervision for persons whose incapacity has been declared as being partial or temporary.

Tutorship council: a group, usually composed of three members chosen by family members and friends attending the meeting of family and friends, which is responsible for monitoring the administration of the tutor or curator of an incapable person and providing them with opinions and authorizations with respect to specific matters. The council also has a secretary, who may be one of its members; this person takes the minutes of meetings that are held at least once a year.

If you have questions or are looking for the address of the office nearest you:

Call us at **514 873-4074** or **1 800 363-9020**

Monday to Friday, 8:30 a.m. to 4:30 p.m. (Wednesdays open at 10:00 a.m.)
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