

In case of incapacity: the protection mandate



Le Curateur public du Québec

À la rencontre de la personne



In case of incapacity

Have you ever wondered what would happen if an illness or an accident left you unable to care for yourself or your property?

It's an unpleasant thought, of course, and one would rather not dwell on it. It's easier to think of as something that happens to other people.

Yet isn't there greater peace of mind in deciding for yourself who should take care of you if you become incapacitated, instead of letting others decide for you when you are no longer able to do so?

The Civil Code of Québec provides an instrument by which you can make this choice: the protection mandate. By means of this instrument, a person of legal age may entrust one or several other persons with the responsibility for taking care of them or administering their property if they become incapable of doing so themselves. The choices a person expresses in their mandate will take precedence over any arrangement others might make.

We cannot always avoid illness or accidents. But with a protection mandate, we can decide which person or persons will take care of us or our property if we become unable to do so. This is the simplest way to protect the future, have your wishes respected and make things easier for family members.



...the mandate

The Curateur public has prepared a brochure that contains a sample protection mandate. Published by Les Publications du Québec with the title *My protection mandate*, it also explains how to have a mandate homologated by the court and the role of the Curateur public with respect to mandataries. This brochure is available at bookstores that sell Publications du Québec products and is also available free of charge on the Web site of the Curateur public du Québec:

www.curateur.gouv.qc.ca/mandate

What types of mandate are there?

The protection mandate is a document in which you, the **mandator**¹, express your wishes now in the event that you would be unable to do so later. The mandate specifies the name and responsibilities of the **mandatary**², the person who will carry out your mandate.

Don't confuse the protection mandate with the «power of attorney,» which applies only to assets. As soon as an incapacity is declared, in theory the power of attorney becomes invalid. It is only when a person becomes incapable that the protection mandate can be homologated (validated by a clerk of the court or a judge) and takes effect.

To be valid, a protection mandate can be one of two types: a notarized mandate prepared by a notary or a mandate made in the presence of witnesses, also known as a mandate by private writing. The latter can be prepared by you or by a person of your choice, according to your instructions and in the presence of two witnesses. In preparing this type of mandate, it is wise to obtain advice from a notary or lawyer, especially if the administration of your property is complex.

1. The mandator is the person who is the subject of the protection mandate.
2. The mandatary is the person chosen by the mandator to execute the wishes expressed in the protection mandate.

How do you make a mandate?

It's not hard to prepare your own protection mandate if you follow a few rules. It can be general or specific. However, the general mandate gives the mandator greater freedom of action to deal with the unexpected. It provides for the administration of all of your property, rather than giving a detailed list of property to be administered or things to do. A specific list might prevent the mandatory from acting with regard to property not specifically mentioned.

Your mandate should include the following:

- ◆ the date on which you wrote it;
- ◆ your name (mandator's name);
- ◆ the name of your mandatory or mandataries, and of their replacement(s);
- ◆ the name(s) of the person who will receive the report;
- ◆ your signature;
- ◆ a dated declaration signed by two witnesses.

It is essential to have two witnesses with no interest in this document. They certify that you are of sound mind and capable of giving a mandate. You must tell them the nature of the document but are not obliged to disclose its contents. You must sign your mandate. Both witnesses must sign immediately afterwards in your presence and recognize your signature.

We advise informing the mandatory or mandataries of the existence of the protection mandate and providing a copy. The original should be kept in a safe place that the mandatory knows about and can access when homologation is required.

Moreover, if a replacement is named to take the place of the main mandatory or if you have designated a third party³ to receive a periodic administration report, you should inform these persons as well.

3. A third party here refers to a legal entity or a financial institution, such as a trust company authorized by law to act as mandatory.



What can you stipulate in a mandate?

The content of your protection mandate depends on your wishes. You can designate a mandatory to look after your property and your person. You can designate more than one mandatory – for example, one to administer your property and another to take care of your person.

When you entrust a mandatory with the administration of your property, you can include such actions as administering bank accounts and investments, paying mortgage installments and taxes or collecting rent. These are all acts required to preserve your property or maintain its use, which constitutes a **mandate for simple administration**. You can also give greater responsibility to your mandatory, with the power to sell your property or goods or mortgage your real estate without obtaining further authorization. This is a **mandate for full administration** and can be entrusted to a third party.



When you appoint a mandatary to care for your person, the authority given includes consent to your living arrangements or necessary medical care on your behalf if you are unable to give such consent on your own.

It is advisable to designate a person to whom your mandatary must report on what has been done on your behalf and set a schedule (once a year, for example) for doing so.

Do you want to name a replacement if the initial mandatary is unable or unwilling to execute the mandate? Do you want to name a person to whom the mandatary has to report? Do you want to remunerate your mandatary? Do you not want to be kept alive artificially? Do you want to name a tutor to a minor child? All of these are situations that can be covered by clauses in your protection mandate.

When does the mandate come into force?

Two conditions must be met for your protection mandate to come into force. First, you must become incapable⁴; second, the mandatary must have the mandate homologated by a clerk of the court or a judge of the Superior Court. The homologation procedure may be undertaken by a lawyer or notary.

In fact, homologation of the protection mandate by a clerk of the court or notary does not necessarily require a court hearing. However, it is necessary to interview the person who has given the mandate to determine that they are in fact incapable. Only in rare cases will a trial be required, such as if you contest your incapacity or if your mandatary's actions show carelessness towards you or suspicious behavior.

Why is homologation required?

The purpose of homologation is to verify the mandator's incapacity and the existence and validity of the protection mandate. This step is essential to protect the mandator, the mandatary and third parties.

The designated mandatary⁵ or the mandatary's representative (lawyer or notary) applies to the court for homologation. In other words, for the protection mandate to become enforceable, the mandatary must take the necessary steps with a notary, the clerk or a judge of the Superior Court. The application must be accompanied by an original copy of the protection mandate and the medical and psychosocial assessments. The mandatary files the motion at the courthouse in the judicial district where the mandator is domiciled or resident.

4. A person is declared incapable by the court after a medical and psychosocial assessment.
5. If several mandataries have been designated, one of them may request homologation or they may apply for it jointly.

What happens if the mandate is incomplete?

If your protection mandate does not provide for you to be represented appropriately as a function of your incapacity, a form of protective supervision (tutorship or curatorship) will be sought to complement it. Your mandate nevertheless remains valid and the mandatary continues to execute it. In such a case, the person administering your property is required to report to the curator or tutor designated to look after your person. Conversely, the curator or tutor designated to look after your property should report to the mandatary designated to look after your person.

What happens if your mandatary dies or is unable to execute your mandate?

If your protection mandate provides for a replacement, the replacement takes over. Otherwise, before relinquishing the office, your mandatary should apply for the institution of protective supervision⁶. If the mandatary dies and there is no substitute mandatary, the liquidator of the mandatary's estate is required to notify the Curateur public, which may seek the institution of protective supervision.

6. In Québec, when a person is declared incapable of administering their property or taking care of themselves, the law provides for the establishment of protective supervision under which a family member or friend or the Curateur public is named to represent the person. Brochures on the various forms of protective supervision are available from the Curateur public du Québec and may be consulted on its Web site.



What happens if you regain your capacity to act for yourself?

You can ask the clerk of the court or the judge to stop the application of the protection mandate. If you are receiving care or services from a health or social services institution, the director general of the facility must submit an attestation of capacity to the court, including a medical and psychosocial assessment.

A notice of termination of the effects of the protection mandate is then sent to the mandator, the mandatory or mandataries and the Curateur public.



Can a mandate be changed?

A person capable of acting can change their protection mandate at any time before it is homologated. For example, they can designate another mandatary or change certain clauses of the mandate.

When changes are made to the mandate, it must again be signed by two witnesses or the notary must again be involved.

Does registers exist?

Mandates received by a notary are registered with the Chambre des notaires, and those prepared by a lawyer are registered with the Barreau du Québec. For its part, the Curateur public keeps a register of protection mandates that have been homologated by the court⁷.

7 Under the Health Insurance Act and the Act respecting access to documents held by public bodies and the protection of personal information, the Curateur public and the Régie de l'assurance maladie du Québec have signed an agreement allowing them to exchange confidential information on their respective clients. These exchanges allow updating the register of homologated mandates.

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.) or visit our website at www.curateur.gouv.qc.ca.

Write to us

◆ E-mail

Contact us page of our website.

◆ Regular mail

Le Curateur public du Québec
600, boulevard René-Lévesque Ouest
Montréal (Québec) H3B 4W9

The law takes precedence over
the content of this document.

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