

In case of incapacity: the 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 mandate in case of incapacity. 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 mandate in case of incapacity, 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 avoid problems for family members.

...the mandate

The Curateur public has prepared a brochure that contains a detailed sample mandate in case of incapacity. Published by Les Publications du Québec with the title *My mandate in case of incapacity*, 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 on the Web site of the Curateur public du Québec:

www.curateur.gouv.qc.ca

What types of mandate are there?

The 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 mandate with the "power of attorney," which applies only to assets. Moreover, a "power of attorney" generally ceases to be valid as soon as a person who gave it is no longer able to supervise its execution. It is only when a person becomes incapable that the mandate can be **homologated** (validated by a clerk of the court or a judge) and takes effect.

To be valid, a mandate can be one of two types: those prepared by a notary ("notarial act") and those "as a private writing." The mandate as a private writing can be prepared by yourself, a lawyer or a person of your choice, according to your instructions and in the presence of two witnesses. If you write such a mandate, it is wise to obtain advice from a notary or lawyer, especially if the administration of your property is complex.

How do you make a mandate?

It's not hard to prepare your own 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. The general mandate 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 mandatary 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 mandatary or mandataries;
- ◆ 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. It can also be signed by a third party (someone besides you) according to your instructions. Both witnesses must sign immediately afterwards in your presence and recognize your signature.

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

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

1. The mandator is the person who is the subject of the mandate.
2. The mandatary is the person chosen by the mandator to execute the wishes expressed in the mandate. A mandator may designate one or more mandataries to execute the mandate.



What can you stipulate in a mandate?

The content of your mandate depends on your wishes. You can designate a mandatary to look after your property or your person or both at the same time. You can designate more than one mandatary – for example, one to administer your property and another to take care of your person.

When you entrust a mandatary with the administration of your property, you can include such actions as administering bank accounts, 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 mandatary, 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 legal entity³.

When you appoint a mandatary to care for your person, the authority given includes consent to 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 once a year? Do you want to remunerate your mandatary? Do you not want to be kept alive artificially? Do you want to donate your organs? Do you want to name a tutor to a minor child? All of these are situations that can be covered by clauses in your mandate.

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

When does the mandate come into force?

Two conditions must be met for your 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. A number of notaries now have special powers facilitating the presentation of completed request to a judge or clerk of the court.

In fact, homologation of the 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 mandate. This step is essential to protect the mandator, the mandatary and third parties.

The mandatary⁵ or the mandatary's representative (lawyer or notary) applies to the court for homologation. In other words, for the mandate to become enforceable, the mandatary or the mandatary's representative must take the necessary steps with the clerk or a judge of the Superior Court. The motion must be accompanied by an original copy of the 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 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 person should report to the person designated to look after your property.

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

If your 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 mandate. If you are receiving care or services from a health or social services institution, the director general of the facility can submit an attestation of capacity to the court, including a medical and psychosocial assessment.

A notice of termination of the effects of the 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 mandate at any time before it is homologated. For example, they can designate another mandatory 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.

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

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