



## My father and his mandate in anticipation of incapacity

Your elderly father is losing his memory and his faculties are diminishing such that you believe he is becoming incapable of caring for himself and administering his property. Before your father's health began to deteriorate, he had prepared a mandate in anticipation of incapacity naming you as mandatary. What must you do in order to be authorized to act according to this mandate?

### THE FACTS

The daughter of an 80-year-old man asks the court to declare her father incapable of taking care of himself and his property. She asks the court for the homologation of the mandate of incapacity signed by her father on February 12, 1991, so that the mandate may be executed. The mandate in question is valid and conforms to the requirements fixed by law. By its terms, the father names his daughter as the principal mandatary. However, both her brother and her father believe that the request is premature and that the father is not incapacitated. The brother believes that because he has his father's interests at heart, he will better represent his father. He asks that he be named his father's mandatary should his father be declared incapacitated.

### THE ISSUE IN DISPUTE

Is the father incapable of caring for himself and administering his property? Should the mandate prepared in anticipation of diminished capacity be probated by the court in its entirety?

### THE JUDGMENT

The court comes to the conclusion that the father has become incapacitated and is no longer able to take care of himself and administer his property. Consequently, the application for the homologation of the mandate in anticipation of incapacity is granted. The court proceeds to the appointment of the daughter as mandatary according to the terms of the mandate.

### THE REASONS

According to general principles, all persons are considered to be capable of exercising their civil rights and taking care of themselves. However, it can happen that a person becomes incapacitated, and the institution of protective supervision is required. The civil code provides rules according to which a mandate given in anticipation of incapacity will be executed. These rules are aimed at ensuring that the request protects the interests, respects the rights, and safeguards the autonomy of persons of full age. First of all, the Court must ascertain the person's incapacity through a review of the medical proof presented to demonstrate that his or her state of health has resulted in significant loss of physical and psychological autonomy. The court must also evaluate the extent of the person's incapacity in order to judge if the mandate is complete, to respect the mandate and, if needed, to institute a more appropriate level of protective supervision to accord with the degree of protection required. In the case presented here, the father's incapacity has been established. Further, the evidence reveals that the mandate is valid and that it ensures adequate representation given the situation and the father's needs. Finally, the daughter, who is designated principal mandatary according to the terms of the mandate, is capable of acting as mandatary.

#### References

*M.L. v. M.J.*, March 8, 1996, Joliette 705-14-000215-959, J.E. 96-971  
*Civil Code of Quebec, S.Q.*, 1991, c.64, ss 1, 4, 256, 258, 273, 276, 1409, 2166.  
*Code of Civil Procedure, R.S.Q.*, 1977, c. C-25, arts. 884.1 and following

The judgement discussed in this article was rendered based on the evidence submitted to the court. Each situation is unique. If in doubt, we suggest you consult a legal aid lawyer.

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