

Planning for Incapacity with a Protection Mandate

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Laying out your wishes should you become incapacitated can enhance your quality of life and make things easier for your loved ones should the time come. This article explains a protection mandate and its benefits, and is intended for Quebec residents only.

Work, renovations, meals, driving the kids to the arena, managing family finances and lending a hand to aging parents... it's difficult to imagine that one day, you may have to rely on others to take care of you and manage your daily life.

And yet, this is often part of getting older, not to mention misfortunes like an illness or an accident that may occur and precipitate a loss of cognitive and physical independence.

Preparing for this is emotionally challenging, especially when you still feel in your prime, but the good news is that it is relatively simple from an administrative and legal standpoint: you need to prepare a protection mandate.

What is a protection mandate?

Formerly known as a mandate in case of incapacity, the protection mandate is a document enabling you to designate in advance the person(s) who will make decisions on your behalf should you no longer be able to take care of yourself and your property. In addition, the mandate allows you to specify the care you wish to receive, your housing preferences and the way your investments will be managed.

"Unlike a last will and testament, which will serve at some point, the protection mandate is the document you must have while hoping never to use it," summed up Audrey Lapointe, Vice-President and Regional Director – Trust and Estate Services for Quebec and the Atlantic at BMO Private Wealth.

While the will has become the standard document in which we spell out our wishes after we pass away, the protection mandate plays a similar role for a period when we are still alive, but unable to make all the decisions. In this respect, the protection mandate is also different from a power of attorney, which allows a designated person to carry out some routine tasks such as paying bills or withdrawing cash should we become physically unable, but remain of sound mind and able to make decisions.

The benefits of a protection mandate

Designating in advance trustworthy mandataries (and their replacements) has several benefits. First, it allows you to select the persons with the best skills and closest affinity to tend to the different facets of your life. The person best suited to take care of your children will not necessarily have the same profile as the one most adept to handle your investments! The protection mandate also enables you, if you so wish, to plan for the compensation of your mandataries or some remittances, gifts or donations to other relatives or friends or to charitable causes you care about.

Recording your wishes for the management of your property also allows you to determine the level of risk you are prepared to take with your investments. Without a protection mandate specifying your intended risk profile, a low-risk approach will be applied automatically, which is not necessarily ideal for all investors.

"Having a protection mandate can make a huge difference in financial terms," stressed Audrey Lapointe. "If other guidelines are not recorded in a protection mandate, the portfolio of a person who becomes incapacitated will automatically be managed in a conservative manner, with presumed sound investments. This change may require adjustments that could entail costs, and even losses. The impact could be significant on a portfolio worth several thousand or million dollars," explained Audrey Lapointe.

What will happen if I become incapacitated without a protection mandate?

Without a protection mandate prepared in advance, the public curator (Curateur public du Québec) will take charge and apply a standardized management approach.

This government organization oversees the protection of incapacitated persons and the property of minors. When someone is declared incapacitated without having prepared a protection mandate, the public curator will set up a three-person council known as tutorship council in the case of a partial or temporary incapacity, and curatorship council for a total and permanent incapacity.

This council is mainly made up of family members or friends of the incapacitated person. A tutor or private curator will then be selected by and among the members of this council and designated by the court as the legal representative for the protection, the exercise of civil rights and the administration of the property of the incapacitated person.

Although the public curator and the council are required to make decisions in the interest of the person they represent, you are the person most likely to best know what you need and who you trust!

Indeed, this type of management involving the public curator may not meet your wishes: Will the person appointed by the tutorship council really be the best one to take care of you and your property? Do you want to be limited to presumed sound investments? This is what will be forced on you.

Without a protection mandate, it will also be impossible to keep some arrangements set up prior to your incapacity, such as allowing your spouse to stay home and pay his/her expenses or paying for your grandchildren's education.

"Often, one spouse may earn a lot more than the other and pay most of the household expenses. Without a clause providing that the cash and property of the wealthier spouse will be used for the other spouse's well-being, the latter may be faced with difficult choices such as selling the home. The protection mandate is also designed to protect our spouse", explained Audrey Lapointe.

Finally, annual reports will have to be prepared and submitted to the public curator and the tutorship council for approval. This responsibility is not to be taken lightly, said Audrey Lapointe: "In addition to the administrative burden of submitting reports, the private curator will be questioned on the expenses incurred and investments made. Even when everything is done respectfully, this process can prove emotionally unsettling".

To avoid all this paperwork and this somewhat rigid approach, it is worth taking the time to record your wishes in a protection mandate while you are in full possession of your faculties. This mandate will afford you a life more in keeping with your wishes in case of incapacity and could make things a lot simpler for your loved ones.

Once I have prepared my mandate, what comes next?

Now that you have prepared your protection mandate, had it signed by two witnesses, reread it and updated it periodically as needed, what will happen should you become incapacitated?

When your family and friends realize that you are no longer able to make decisions on your own, they must contact a notary who will be able to guide them through the process of homologating the protection mandate and requesting the opening of protective supervision that will enforce the provisions of the mandate you have prepared.

First, a medical report from the attending physician and a psychosocial assessment by a social worker must be obtained to certify the incapacity. Then, a search will be made in your records and in the will and mandate registries of the *Chambre des notaires* and the *Barreau du Québec* to check whether a protection mandate exists. This information will be communicated to your family and friends and presented to the court which will make the final determination of incapacity. At that point, the process of homologating the mandate or opening of protective supervision (tutorship or curatorship) will begin. This may take several months, but it will ensure that the incapacitated person is well taken care of and really needs such supervision.

Planning for your incapacity: A gesture for yourself and your loved ones

Although we all hope never getting to that stage, contemplating what your life would be like should you become incapacitated could help you think of the best ways to improve your circumstances and lessen the burden for your family and friends who would have to deal with your loss of independence. A formal statement of your wishes in a protection mandate may both afford you a better quality of life and make things a lot easier for those around you in the event of your incapacity.

For more information, please speak with your BMO financial professional.



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