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FINANCIAL GROUP

PERSPECTIVES

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PROTECTION MANDATES: PLANNING AHEAD TO PROTECT ONESELF

No one enjoys thinking about the moment when they will no longer be able to make their own decisions. This is precisely where the value of a protection mandate lies: as a flexible tool allowing individuals to define the terms of their own care while they are still capable of doing so. When incapacity sets in, this document becomes crucial. Understanding it gives one the means to make an informed choice before the decision is left to others.

With a Private Regime Comes Freedom of Design

In Québec, the protection of incapable persons is covered by two types of regimes: public regimes, the most well-known example being tutorship, and consensual or private regimes, the primary example of which is the protection mandate. What distinguishes the latter is that it originates with the person concerned, who freely sets its terms. It is therefore a unique instrument, both legal and personal.

The mandate covers two distinct aspects: the person's protection, including living conditions, housing, and care, and the administration of property. These two aspects may be entrusted to a single mandatary or to different individuals, according to the mandator's wishes. The instrument's flexibility also lies in the ability to adjust, during the drafting process, the terms of applicability based on the degree of incapacity.

Québec courts are unequivocal on this point: even in a situation of incapacity, the person's residual autonomy must be respected. This principle, affirmed by the Court of Appeal and the legislature, guides overall practice. In addition, the recent legislative reform on the protection of incapable persons establishes the principle that the mandatary must, to the extent possible, maintain a personal relationship with the mandator, involve them in decisions, and keep them informed.

Administration of Property: Rigour and Continuity

Once a protection mandate is homologated (approved by a court, thereby making it legally enforceable), the resulting responsibilities are substantial. The protection mandate generally grants the mandatary with full administration powers over the property.

Unlike simple administration, which is limited generally to preserving property, full administration covers a broader scope. In general, full administration includes the preservation of assets, making the patrimony productive and increasing it, while also granting the mandatary the power to sell.

Full administration follows what we refer to as the three pillars of administration: preserving capital, making it productive, and increasing it. These principles, drawn from the rules governing the administration of the property of others as outlined in the Civil Code, apply here with the same rigour as in the context of a trust. Their implementation must, however, take into account the person's actual profile and the terms and conditions of the mandate.

For an elderly person with significant recurring needs, generating income will often be the priority, whereas for a younger person with substantial resources, capital growth will take on greater importance. In all cases, diversification remains essential.

Once the mandate is homologated, the mandatary to the property's first task is to take inventory of assets. An investment policy must then be developed with the portfolio manager and reviewed once a year or more depending on circumstances. In some cases, property administration does not require an investment policy, due to limited liquidity and the type of administration (for example, real estate management).

Choosing a Mandatary: A Delicate Task

While selecting an administrator for property can be relatively straightforward (trust companies and professional managers are available for that purpose), choosing a mandatary to the person can sometimes prove more complicated.

Often, our clients who undertake this process struggle to identify an appropriate mandatary. Even with children, the question does not settle itself: some may not be self-sufficient, while others may be dealing with personal issues. Family dynamics also come into play: naming one child over another can reignite tensions.

For seniors, another challenge arises: a spouse designated as mandatary may, when the time comes, no longer be in a position to assume that role. Designating a substitute mandatary is therefore essential.

Since the reform of November 1, 2022, a protection mandate must include a mechanism for accountability: the mandatary is required to report periodically to a person designated by the mandator through an accounting. Finding someone in one's circle who is able to assume this role can prove just as delicate as choosing the mandatary itself.

General Power of Attorney and Mandate: Two Distinct Instruments

It is common to include, within the same instrument, a general power of attorney and the clauses of a protection mandate. The general power of attorney applies while the mandator is capable, whereas the protection mandate takes over once incapacity has been ascertained by the court.

A general power of attorney does, however, present a challenge: by definition, it is broad. Yet, to be recognized by third parties (financial institutions, title examiners, notaries), the powers granted must be sufficiently specific. An overly general power of attorney may, therefore, not be recognized at the very moment it should take effect.

It is therefore preferable, during drafting, to identify the actions likely to be performed and to provide explicitly for the corresponding powers. Failing that, any gap in the powers granted could require authorization from the Superior Court, a process that is sometimes lengthy and costly. Careful drafting is therefore critical for both the general power of attorney and the mandate.

Homologation and Review: An Evolving Process

To become enforceable, a protection mandate must be homologated. This does not involve "declaring" a person incapacitated, but rather ascertaining his or her incapacity, an important legal distinction. The process is based on two assessments: one medical and the other psychosocial. These are submitted directly to the court; they remain confidential and are not accessible to the public or to family members.

The court is not bound by the initial conclusions sought in the application. Depending on the circumstances, it may split the mandate by homologating only the personal or property aspect or determine that the mandate grants the mandatary too many powers and establish a modulated tutorship instead, preserving certain rights and powers to the person concerned.

If the person's condition improves (following, for example, a severe head injury whose effects fade over time), a reassessment must be requested. The social worker and physician then submit a recommendation to the court, which may, for instance, revoke the mandate and establish a modulated tutorship.

Toward More Comprehensive Protection

The November 2022 reform addressed what had long been considered a significant gap in the regime: the absence of an accountability mechanism during administration. For decades, a mandatary to the property could administer another person's property without being required to report to anyone until the mandator's death. This reform filled a void and reinforced the instrument's value.

Protective supervision still gives rise to apprehension and carries a certain stigma. However, gaining a better understanding of incapacity also means recognizing that it is not absolute: residual capacity remains, and the law seeks precisely to preserve it. A protection mandate is not a document one signs once and for all. Filing it away in a drawer and never looking at it again misses the point: it must evolve with your situation.

It is with this in mind that the Eterna team is available to guide you through this process and help you put in place the measures that reflect your reality.

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