

Powers of Attorney and Mandates of Incapacity



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POWERS OF ATTORNEY AND MANDATES OF INCAPACITY

We have been inspired by difficulties encountered in practice in cases involving powers of attorney and mandates of incapacity. Some of those challenges result from the factual situations that people are confronted with, often those forming part of our aging population, and others result from the law itself.

Preamble

We will be addressing powers of attorney and the pitfalls of having a general power of attorney and one that is integrated in a mandate of incapacity (*living will*).

A confusion often occurs in distinguishing Powers of attorney and Mandates of incapacity.

- Distinction between a general power of attorney and a specific power of attorney

«La procuration est un contrat par lequel une personne en désigne une autre pour la représenter et agir en son nom dans l'accomplissement d'un acte juridique avec une tierce personne. La personne qui donne la procuration est le *mandant* et celle qui l'accepte, le *mandataire*. Cette procuration est dite *générale* si elle confère au mandataire la gestion de l'ensemble du patrimoine de l'ainé, et *spéciale* si elle ne vise qu'une transaction, la vente d'une voiture ou le paiement des loyers, par exemple. La procuration peut également être rédigée au moyen d'un modèle type fourni par une institution financière, auquel cas elle est qualifiée de *procuration bancaire*.»

(Normand-Heisler, 2018)

- Distinction between administration and ownership and joint ownership

Focus and Objective

We intend to address general powers of attorney within mandates of incapacity with the objective of bringing about more awareness to problems and difficulties they can cause in practice. This is a vast subject and an open-ended challenge without any specific or definite solution.

Context

In the respect of the autonomy of will of a person and the promotion of human rights, mandates of incapacity have been consecrated in the Civil Code since 1989:

Depuis 1989, le Code civil du Québec contient des dispositions permettant à une personne apte de faire un mandat en prévision de son inaptitude, favorisant ainsi l'expression de son droit à l'autodétermination. Le mandat, alors qu'il est juridiquement capable, nomme un ou des mandataires afin de pallier son incapacité future à prendre soin de lui-même et à administrer ses biens.
(Lefebvre, 2010)

A further goal of this legislative consecration was to avoid the families the long and complicated process of opening a protection regime.

However, should this mandate be insufficient, a protection regime will supplement it in that Courts cannot rewrite the mandate (Lefebvre, 2010).

Hence, this may be part of the reason that the vast majority of mandates of incapacity contain a general power of attorney with full powers of administration. This may open the door to abuse...

Potential difficulties can arise in two situations :

- a. When the mandate has been homologated
- and / or
- b. Before the mandate has been homologated

Many mandators refuse to have specific provisions in their mandates obliging the mandatory to a yearly rendering of an account although suggested by some notaries because it is reported that they have confidence in their chosen mandataries (Lefebvre, 2010).

The emphasis should be one of prevention rather than trust.

Choice of mandataries

The choice of mandataries is almost as important as the document itself.

- Mandator's context and needs considered as well as willingness of the potential mandataries

It is important to note that general powers of attorney (or specific ones) can be exercised simultaneously by the mandator and the mandatory if the mandate of incapacity has not been homologated or a recourse in homologation has not been introduced.

These general powers of attorney with full powers of administration have been the subject of numerous articles including a recent one published by la Chambre des notaries, stating :

Qu'il suffise de donner l'exemple des procurations qui méritent une attention particulière puisqu'elles peuvent entraîner l'exploitation ou la maltraitance financière. En effet, un procuration peut se transformer en un permis de voler – *a licence to steal* – en raison de son utilisation par une personne, négligente, mal informée ou mal intentionnée. Lorsqu'il prépare une procuration, le notaire peut voir à ce qu'elle soit adaptée aux besoins précis du mandant et que les pouvoirs du mandataire soient circonscrits.
(Morin & Simard, 2018)

Once a mandate of incapacity has been homologated, the mandator cannot change his instructions in the mandate of incapacity, only interested parties can including the Public Curator through revocation (article 2177 C.C.Q.). However, they have to be made aware of an abuse or mismanagement of the mandator's property (Lefebvre, 2010).

Many scholars and practioners suggest a yearly accounting be specified as an obligation of the mandatory (Beauchamp, 2018) and also at the outset, an inventory of the mandator's property (Levebvre, 2010).

Interpretation

There is a difficulty with mandates of protection and those including general powers of attorney, because the legislator has consecrated these mandates under the rules of contracts, specifically the nominate contracts of mandates and where rules of the administration of the property of other's apply (or not) to supplement the document (except for the imperative provisions of the Civil Code).

Under rules of contract law, the autonomy of will dominates but this becomes a dilemma in the case of mandates of incapacity and those including general powers of attorney. Some authors have noted that the rules pertaining to the regimes of protection under the rules of Persons in the Civil Code are better suited in this particular instance and mandates of incapacity should have been articulated by the legislator in the Book of Persons (Lefebvre, 2010).

Furthermore, case law does not rigorously apply or mention relevant articles of the Civil Code which apply to mandates and to the administration of the property of others :

Le tribunal ne fait souvent aucune référence expresse aux règles relatives au mandat ou à l'administration du bien d'autrui pour trancher le litige. Il réfère plutôt du bon jugement que de normes législatives précises.
(Normand-Heisler, 2018).

All this rests on a definition of incapacity which is the basis of homologation by the court of mandates of incapacity.

Homologation by the court

As with the lack of clarity in the application of the rules of mandate and administration of the property of others, the notion of incapacity, determined at the moment both in its legal conception and medical and psychosocial appreciations, is not clearly defined.

Article 2166, al. 2, C.C.Q. states : «The performance of the mandate is conditional upon the occurrence of the incapacity and homologation by the court upon application by the mandatary designed in the act».

An excerpt of the Minister of Justice's comments under this article states :

Par ailleurs, l'exécution d'un tel mandat équivaut à une déclaration d'incapacité du mandant; c'est dorénavant le mandataire qui exercera les droits civils de cette personne à sa place. Il importe pour le mandant surtout, mais aussi pour les tiers, que cette incapacité soit constatée par le tribunal et que ce dernier vérifie la validité du mandat. Il n'a pas paru opportun de déléguer à d'autres qu'au tribunal l'obligation de faire le constat d'incapacité du mandant, car les droits fondamentaux de la personne sont en jeu.

Article 2173 C.C.Q. and articles 258 and following of the Civil Code of Quebec refer to Medical and Psychosocial evaluations to ascertain incapacity.

Article 2173

If the director general of the health and social services establishment which provides care or services to the mandator becomes aware that the mandator has again become capable, he shall attest to such capacity in a report filed in the office of the court. The report includes the medical and psychosocial assessment.

The clerk informs the mandatary, the mandator and the persons qualified to intervene in an application for the institution of protective supervision that the report has been filed. If no objection is made within 30 days, the court is presumed to have found that the mandator has again become capable, and the clerk shall, without delay, transmit a notice of cessation of the effects of the mandate to the mandator, the mandatary and the Public Curator.

Article 258

A tutor or curator is appointed to represent, or an adviser to assist, a person of full age who is incapable of caring for himself or herself or of administering property by reason, in particular, of illness, deficiency or debility due to age which impairs the person's mental faculties or physical ability to express his or her will.

A tutor or an adviser may also be appointed to a prodigal who endangers the well-being of his or her married or civil union spouse or minor children.

Article 276

Where the court examines an application to institute protective supervision, it takes into consideration, in addition to the advice of the persons who may be called to form the tutorship council, the medical and psychosocial evidence, the wishes expressed by the person of full age in a protection mandate but which has not been homologated, and the degree of autonomy of the person in whose respect the institution of protective supervision is applied for.

The court shall give to the person of full age an opportunity to be heard, personally or through a representative where required by his state of health, on the merits of the application and, where applicable, on the form of protective supervision and as to the person who will represent or assist him.

These evaluations though not exclusive in establishing incapacity and its degree however, are an essential element in the homologation process.

We exclude the homologation before a notary.

Legal and medical appreciation of capacity

It is the degree of inaptitude which will result in incapacity or degree of incapacity.

Quoting the Supreme Court in *Thibodeau c. Thibodeau*, [1961] R.C.S. 285, Justice Benoît Moore recently wrote :

C'est ainsi que plusieurs dispositions utilisent le terme «aptitude» dans le sens des facultés d'une personne à prendre une décision, d'en comprendre les conséquences, la protégée. Dans ce sens, est inapte la personne qui «[...] n'a pas la volonté de l'apprécier [le consentement], d'y résister ou d'y consentir, si, à raison de la faiblesse de son esprit, il ne peut peser la valeur des actes qu'il pose ou les conséquences qu'ils peuvent entraîner, si en un mot il ne possède pas le pouvoir de contrôler son esprit, [...]».
(Moore, 2015)

The law refers to medical and psychosocial assessments which should guide the court's determination of the degree of incapacity.

Hence, medical evaluations are a diagnosis of incapacity. Various tests and different methods are used and there are no imposed methods of evaluation or a consensus of standardized testing (Giroux, 2015).

Since 2012, social workers are the only professionals who can conduct a psychosocial evaluation and according to their published *Guide de pratique*, they conduct their evaluations based upon the medical diagnosis of incapacity with a view to determine how this incapacity affects the person in his environment (Boulet, 2017).

When capacity is contested the above articles are considered and should play an important role in the case of safeguard orders.

Beforehand

Article 2167.1 C.C.Q. states :

Article 2167.1

In the course of homologation proceedings or even before if a request for homologation is imminent and it is necessary to act to prevent serious injury for the mandator, the court may issue any order it considers necessary to ensure the personal protection of the mandator, his representation in the exercise of civil rights or the administration of his property.

An act under which the mandator has already charged the administration of his property to another person continues to produce its effects notwithstanding the proceedings, unless the act is revoked by the court for a serious reason.

Subsequently

Article 2177 C.C.Q. which applies to revocation of a mandate, is also invoked by the courts to refuse homologation of a mandate of incapacity (*S.F. c. M.A., 2015 QCCS 1046*).

Article 2177

Where the mandator is incapable, any interested person, including the Public Curator, may, if the mandate is not being faithfully performed or for any other serious reason, apply to have the court revoke the mandate, order the rendering of an account by the mandatary and institute protective supervision for the mandator.

The courts have a broad discretion in applying these provisions of law.

The whole respectfully submitted by Gerald Stotland and Mandy Alessandrini.