



Centre de santé et de services sociaux
de Memphrémagog



TABLE de CONCERTATION aux **AÎNÉS**
de la **MRC MEMPHRÉMAGOG**

SPOKEN WORDS ARE FORGOTTEN ... WRITTEN WORDS LIVE ON

HOW TO MAKE SENSE OF
✎ **A POWER OF ATTORNEY**
✎ **A MANDATE IN CASE OF INCAPACITY**
✎ **A WILL**



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INTRODUCTION

This booklet was drawn up by *le Comité de prévention des mauvais traitements faits aux personnes âgées de la Table de concertation aux personnes âgées de la MRC Memphrémagog*.

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SOME DEFINITIONS

MANDATOR: The person entrusting one or more persons with one or more tasks (the principal)

MANDATARY: The person carrying out the task or tasks entrusted to him/her (the representative)

MANDATE (POWER OF ATTORNEY):

Document in which the mandator entrusts one or more tasks to the mandatary

TESTATOR: The person making a will (testament) in which he/she expresses his/her final wishes

LIQUIDATOR (FORMERLY REFERRED TO AS THE EXECUTOR):

The person executing the testator's final wishes after the latter's death



TABLE OF MAIN POINTS

	What is it?	When it takes effect	Modification or termination
1.0 Mandate (power of attorney)	Mandate (power of attorney) given to another person of sound mind for a specific purpose concerning the administration of property (paying bills, managing a bank account, etc....).	Valid only while the mandator is alive and of sound mind.	The mandator may terminate it at any time, ideally with written advice to the financial institution. It is no longer valid after the person has been declared incapable and the mandate has been homologated by the court, or after the person has died.
2.0 Mandate in case of incapacity	Legal document in which an adult person of sound mind (the mandator) designates another person (the mandatary) to make decisions concerning the person (mandator) and/or his/her property , in the event that an illness or an accident permanently or temporarily deprives the mandator of his/her faculties.	Applies only after the declaration of incapacity and once the mandate is homologated by the court. Only valid while the mandator is alive. Whether it is notarized or written in the presence of two witnesses, the mandate needs to be homologated (confirmed) by the court).	The Mandate in Case of Incapacity ends when the mandator regains his/her capacity or at the time the mandator dies. The Mandate in Case of Incapacity also ends when the mandatary dies without a substitute having been named, or when the mandator comes under a regime of protective supervision.
3.0 Testament (will)	A legal document in which an adult of sound mind provides for his/her final wishes concerning the disposition of his/her property at death.	Applies only after death and when executed by the liquidator.	A testament (a will) may be modified at any time before the testator's death.



1.0 MANDATE (POWER OF ATTORNEY)

1.1 Special mandate versus General mandate

We talk of a mandate (power of attorney) when a person specifically entrusts a task to another person in a well defined way with regard to the administration of property.

A general mandate gives all rights to the mandatary with the exception of taking out a loan. A special mandate spells out the tasks to be carried out: e.g. paying bills, collecting rent, negotiating cheques, selling a car, etc. ...

1.2 Contents of a mandate

The mandate (power of attorney) must include the following:

- The date on which it was drawn up;
- The name of the person giving the mandate (the mandator);
- The name(s) of the mandatary or mandataries;
- A description of the duties conferred on the mandatary;
- A schedule of tasks;
- The signature of the mandator.



SAMPLE MANDATE (POWER OF ATTORNEY)

The present mandate (power of attorney) is given by _____
of _____, _____ Street, _____
City/town of _____ province of Quebec.

1. Naming the mandatary

I name _____ of _____
as my mandatary who will represent me in all dealings with a third party and act
on my behalf. Without limiting the generality of the foregoing, I grant him/her the
power to transact with _____ their successors
(name of bank and/or other entity)
or assigns.

I also grant him/her the power to transact with any other creditor or government
agency who has files bearing my name.

2. Confirming the acts of a mandatary

I approve and confirm all acts of my mandatary and commit myself to honour any
and all agreements my mandatary will reach.

3. Duration of Power of Attorney

The present power of attorney shall remain in effect until such time a written
notice of revocation signed by me or a notice of an act or of a fact terminating the
present power of attorney will have been given to the parties my mandatary had
dealings with.

4. Revocation

I hereby revoke any power of attorney previous to this present one.

.....



5. Termination by death or for other causes

I understand that, as provided by law, the present power of attorney will end as a result of certain events, such as a Declaration of Incapacity or in the event of my death.

I have signed the present power of attorney in the presence of a witness whose name appears below, this _____ of _____ 20__ at _____
_____ in the Province of Quebec.

Declaration of the witness

I was witness to the signing of the present declaration by _____
at the aforementioned date.

I am an adult. I am neither the mandatary nor the spouse/partner of _____
_____.

Nothing leads me to believe to that _____
is unable to give the present power of attorney.

Signature of the witness

Name of the witness (in block letters)



1.3 Advice on how to prevent misuse of power of attorney

Where possible, arrange pre-authorized payments to minimize the use of cash and to avoid problems if you are hospitalized or convalescent.

Establish a monthly budget to be managed by the mandatary and have only the budgeted amount transferred from your bank account to a separate account for the exclusive purposes of the power of attorney.



2.0 MANDATE IN CASE OF INCAPACITY (LIVING WILL)

2.1 Contents of a mandate in case of incapacity

The Mandator may include a wide range of clauses in his/her mandate:

- Dealing with the administration of the mandator's property in a highly detailed or very general way;
- appointing a sole mandatary or one to protect his/her person and another to manage his/her property;
- designating a substitute mandatary, in case the appointed mandatary refuses to act, is unable to act, or dies;
- specifying the kind of medical treatment he/she wishes, or rather does not wish to undergo in case of certain health problems (prolonging life by artificial means);
- indicating his/her end-of-life wishes;
- choosing a guardian for his/her minor children;
- etc.

2.2 Forms of mandate in case of incapacity

The law provides for two forms of mandate, a mandate by notarial deed, or one given in the presence of witnesses.

2.2.1 Mandate by notarial deed

A notary prepares the document of the mandate which is registered with the Chambre des notaires. It can therefore be located easily.

2.2.2 Mandate given in the presence of witnesses

A mandate written by the mandator, or by a third party according to the mandator's instructions.



The document must be signed by the mandatary in the presence of two witnesses who must be disinterested parties (must not be mandataries)

- The witnesses must then countersign the document without the mandator having to disclose the contents of his mandate to the witnesses;
- Their signature certifies that the mandator was of sound mind when signing the mandate.

Since this form of mandate is not registered:

- the mandator is strongly advised to tell his/her family, and in particular the mandatary and substitute mandatary of the existence of a mandate and where it is located.
- it is even recommended to make several copies of the mandate and to hand over one copy each to the mandatary and the substitute mandatary.

2.3 What is homologation?

It is a legal procedure to be undertaken (by way of a motion) before the Superior Court in the district where the mandator is a resident, the object being to:

- verify the existence of the mandate;
- establish its validity;
- confirm the mandator's incapacity

It is up to the mandatary to start the procedure for homologation of the mandate (motion).



The application must be accompanied by:

- a copy of the mandate;
- a medical assessment establishing the mandator's incapacity;
- a psychosocial assessment as to the mandator's incapacity.

These assessments are obtainable from health professionals, who very often will have met with the family to inform them that the mandator is now incapacitated and that they will have to:

- either seek homologation of the mandate;
- or request the opening of protective supervision if there is no mandate in case of incapacity.

2.4 Opening of protective supervision

When incapacity strikes a person who does not have a "mandate in case of incapacity", somebody has to be designated to make decisions for the incapacitated person and his/her property. Here we have a situation calling for the opening of protective supervision.

In Québec there are three kinds of protective supervision (of persons of full age):

- Advisers to persons of full age;
- Tutorship;
- Curatorship.

The choice depends on the degree of the incapacity and its expected duration.

When a person becomes incapacitated and does not have a mandate in case of incapacity, a close friend or relative will have to file a motion for the



opening of protective supervision with the Superior Court. The medical and psychosocial assessments must be filed together with the motion.

The Court then convenes a meeting of relatives, including those by marriage, and/or friends to discuss what should happen with the incapacitated person.

- This meeting must bring together at least five people in the presence of a clerk to the court.
- In this meeting, the form of protective supervision and the representative will be chosen.
- A tutorship council will also be set up to supervise the chosen representative.

The clerk to the court consults the persons assembled for the meeting, then renders a decision appointing the representative and those to be members of the tutorship council. The clerk is not bound by the recommendations of the persons at the meeting.

The clerk to the court may designate the Curateur public as legal representative in the following cases:

- disagreement among the persons assembled for the meeting;
- inability to designate a legal representative
- fewer than five persons are present at the meeting

The same applies if nobody files a motion for the opening of protective supervision; the Curateur public will act on behalf of the family and will likely be designated as the representative.

We see that without a mandate in case of incapacity our life will be

- totally out of our control;



- in the hands of our next of kin, of the court, maybe even of a government body, the Curateur public... That is why having a mandate in case of incapacity is so important.

With a mandate, the role of the Curateur public will be much less obtrusive:

- keeping a register of homologated mandates;
- intervening during the homologation procedure;
- requesting revocation of a mandate and the opening of protective supervision when warranted by circumstances;
- investigating the mandatary's performance, if there is a complaint of mismanagement.

3.0 WILLS

3.1 Why make a will?

Nobody is forced to make a will. However, if a person dies without one, the deceased's property will be handled according to applicable law and not according to the deceased's wishes.

To make sure our last wishes are followed, it is essential to make a will.

That way we can:

- appoint a liquidator (formerly executor) who will see to it that our wishes are respected;
- pass on our property to whomever we see fit and not necessarily to our family;
- designate a tutor or guardian (with minor children).



3.2 Types of wills

There are three types of will recognized by law in Québec:

- the Notarial will;
- the Holograph will;
- the Will made in the presence of witnesses.

3.2.1 The notarial will

Is drawn up by a notary, who is a public officer. It does not have to be probated and is more difficult to challenge in court.

This type of will is also easier to trace because it must be registered in the *Chambre des Notaires*.

To be valid, a will of this type has to be written in French or in English. It must be dated and show the place where it was signed.

After the will has been read, it is signed by the testator, the notary and a witness, in each other's presence.

The testator may keep the contents of his/her will secret, in which case the witness will be present only at the time of signing and not be present during the reading.

A witness cannot be a beneficiary of the will.

3.2.2 The holograph will

This type of will must be entirely handwritten and signed by the testator. It is furthermore preferable, although not compulsory, to indicate the place and the date.



3.2.3 The will made in the presence of witnesses

This type of will was formerly known as "in the form derived from the laws of England". It requires the presence of two witnesses who acknowledge that the will is indeed the last will and testament of the testator and indeed signed by the latter. Again, these witnesses cannot be beneficiaries of the will, and the testator may keep the contents of the will secret.

This will may be typed or written on a computer by the testator or by a third party. Each page must be initialed or signed by the testator and the witnesses.

3.3 Differences between holograph wills and wills made in the presence of witnesses versus a notarial will

Unlike a notarial will, these first two are not recorded, unless a lawyer is consulted and registers the will in the Registry of the Bar. It is very important, therefore, that you tell people of the existence of a will and where to find it.

A further difference is that such wills must be verified by the court or by a notary before they can be executed. The sole object of the verification procedure is to ensure that the the will is valid and in compliance with formal requirements.

3.4 Testamentary dispositions

For last wishes to be respected, they must be possible and realizable:

- One cannot bequeath goods one does not own anymore or never owned;
- Moreover, one cannot force an heir to accept a legacy



A legacy cannot be accompanied with an illegal or impossible condition. If so, the condition will be void.

Moreover, one cannot control the life of another person, e.g. by saying " my wife shall inherit all my possessions on condition she never remarries ". The condition will be void and the wife will inherit and be able to remarry.

Certain legacies made to persons in authority are void, like a legacy made to anyone of the following:

- the notary handling the will (or his immediate family);
- a person acting as witness to the will;
- a member of a host family with whom the testator resided at the time the will was drafted;
- an employee of a health or social services centre where the testator was receiving care or services at the time the will was made (testator's spouse or close relatives excepted).



GUARANTEED INCOME SUPPLEMENT

If you are a person aged 65 or over receiving Old Age Security Pension benefits and your revenue was under

- \$ 15,240 for a person living alone
- \$ 20,112 for a couple

You could be eligible for guaranteed income supplement benefits.

Do not hesitate to contact Service Canada at 1 800 277-9915 (toll free)

N.B . In 2007, some 43,000 seniors throughout Québec did not know about the existence of this income supplement benefits program.





QUESTIONS ONE SHOULD ASK TO FIND OUT WHETHER ONE HAS BECOME A VICTIM OF ABUSE...

- ☞ Is anyone forcing decisions on me?
- ☞ Is anyone trying to isolate me from others?
- ☞ Am I really in control of my finances?
- ☞ Is someone else always answering for me?
- ☞ Am I really free to make my own decisions?
- ☞ Can I do as I want with my own possessions?
- ☞ Do I have to ask people around me to do what I want?



**STOP ELDER ABUSE,
IT IS POSSIBLE...**

FOR THAT TO HAPPEN, IT'S ESSENTIAL TO BREAK THE SILENCE...

VIOLENCE WILL NOT END BY ITSELF!

Call 819.843.2572
and ask for "l'Accueil - Volet social " at the CSSSM (CLSC)
FOR CONFIDENTIAL SERVICE