

Explaining France's New

Mandat de Protection Future



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By Philip Jenkinson and Alexander Hakopian

If you live or own property in France and are concerned about the future handling of your affairs on French territory in the event of an accident, illness, or simply old age, you can take comfort in a new procedure called the *mandat de protection future*. On January 1, 2009, Article 477 of the French Civil Code was substantially amended. The amended article adds a radically new provision enabling you to put in place a *mandat de protection future* to resolve problems such as paying bills, ensuring handicapped children's interests are protected, securing representation at building co-ownership meetings, and having papers or other legal documents signed on your behalf in the event that you are not able to do so personally. The original text of the new Article 477, in French, along with an English translation, appears on page 63.

The concept of the *mandat de protection future* is not dissimilar to the U.S. law construct of "durable general power of

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attorney effective at a future time or on the occurrence of a contingency specified in the instrument" or "springing general power of attorney," as it is sometimes known. N.Y. Gen. Oblig. Law § 5-1506; *Trusts and Estates Practice in New York*, vol. D, § 1:179 (N.Y. Prac. Series 2009). The authors also understand, however, that there are not insignificant differences between the *mandat de protection future* in France and a springing general power of attorney in the United States. This article summarizes some important aspects of the *mandat de protection future* that practitioners should keep in mind when thinking about planning for a client's property management, personal care, and the care of the client's dependents in France.

As a preliminary matter, it should be mentioned that many states have statutory short forms for springing general powers of attorney. See, e.g., N.Y. Gen. Oblig. Law § 5-1506, Form 1. When clients own property in multiple jurisdictions, however, it is a good practice to secure representation in the jurisdiction of the property situs in order to execute a local springing power of attorney. Doing so ensures that the intention of the client is carried out. In this regard, Article 477 should be of particular interest to estate planners in the United States or

the United Kingdom who represent clients with property in France who until now have had to rely on springing powers of attorney executed in their home states without any guarantee that such an instrument would be recognized in France. Article 477 also may be very helpful to individuals residing outside of France who have dependent family members or loved ones in France who require continuing care.

Who May Grant a Mandat de Protection Future?

The following individuals may grant a *mandat de protection future*: (1) any individual who is considered a major at French law (that is, over 18 years old), regardless of his or her nationality; (2) an individual who is subject to *curatelle*, a French court protection order similar to a guardianship or trusteeship, provided all formalities regarding establishment of the *curatelle* are undertaken with the assistance of his or her *curateur* (guardian or trustee); (3) parents of a child that is considered a major, if the child is not able to look after his or her own interests, provided the parents currently assume the material and affective burden for the child in question; and (4) parents of a child who is considered a minor, provided they have legal parental authority. C. civ. art. 477 (2009). The last two categories are, to a considerable degree, aimed at assisting the parents of

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handicapped children who wish to ensure the protection of their offspring after their own deaths.

To Whom May the Power Be Granted?

Although the power of attorney can be granted to a *mandataire* (the attorney-in-fact) chosen at will by the *mandant* (the principal), he or she could appoint a family member. The French courts also maintain a list of *mandataires judiciaires à la protection des majeurs*, which is a list of appropriately qualified *mandataires*. *Mandataires*, in this sense, are individuals or bodies corporate who are duly qualified and enrolled on the list of *mandataires judiciaires à la protection des majeurs*, to deal with the protection of majors. *Mandataires* carry a duty to protect their charges, which is similar to the role of a fiduciary in the United States. In France, a *mandataire* can be held personally liable for his or her actions as well as those of any third party that he or she may have instructed or substituted. Finally, a *mandataire* can only be discharged from his or her functions under a formal authorization handed down by the *juge des tutelles* (guardianship judge).

How Is the Mandat de Protection Future Put in Place?

The *mandat de protection future* can be executed under private seal (that is, in a

relatively simple document solely between the parties) or by a French notary in the form of an authentic deed. It is important to note that a French notary is not the same thing as a notary public in the United States, and authentic deeds drawn up by a French notary are in many instances enforceable without recourse to the courts. It is a statutory requirement in France that the *mandat de protection future* be dated and signed by hand by the *mandant*. The proposed model document for this purpose by the *Conseil d'Etat* (being the French equivalent of the U.S. Supreme Court in this context) is instructive, but its use is not mandatory.

Under certain circumstances a French notary's services are mandatory, such as when the power is intended to appoint a child's parents as his or her *mandataire*. Even when not mandatory, however, there are certain benefits to using a French notary to establish a *mandat de protection future*, which will be discussed below in the section on safeguards.

When Does the Mandat de Protection Future Enter into Effect?

As a matter of French law, the *mandat de protection future* enters into effect as soon as it has been established in objective

medical terms that the *mandant* is no longer able to look after his or her own affairs. The *mandataire* is required to lodge the *mandat de protection future* along with the appropriate certificate issued by a doctor of medicine with the clerk's office at the *tribunal d'instance* (District Civil Court of First Instance). The clerk of the court then notes on the *mandat de protection future* that it has come into effect and returns the original to the *mandataire*. A *mandat de protection future* granted to a third party by the parents of minor children (or vulnerable majors) comes into effect on the death of the former or on the date when the parents are no longer capable of undertaking the role, for example, as so attested by a medical certificate.

What About Safeguards?

The *mandat de protection future* has certain provisions in place to protect the *mandant*. The following is a procedure for ensuring that each *mandat de protection future* is carried out accurately and faithfully to the *mandant's* desires. An inventory of all the *mandant's* property is made before the *mandat de protection future* comes into force, and this inventory must be regularly updated during the course of the *mandat de protection future*. Each year a *compte de gestion*

Article 477 of the French Civil Code

(French)

Toute personne majeure ou mineure émancipée ne faisant pas l'objet d'une mesure de tutelle peut charger une ou plusieurs personnes, par un même mandat, de la représenter pour le cas où, pour l'une des causes prévues à l'article 425, elle ne pourrait plus pourvoir seule à ses intérêts.

La personne en curatelle ne peut conclure un mandat de protection future qu'avec l'assistance de son curateur.

Les parents ou le dernier vivant des père et mère, ne faisant pas l'objet d'une mesure de curatelle ou de tutelle, qui exercent l'autorité parentale sur leur enfant mineur ou assument la charge matérielle et affective de leur enfant majeur peuvent, pour le cas où cet enfant ne pourrait plus pourvoir seul à ses intérêts pour l'une des causes prévues à l'article 425, désigner un ou plusieurs mandataires chargés de le représenter. Cette désignation prend effet à compter du jour où le mandant décède ou ne peut plus prendre soin de l'intéressé.

Le mandat est conclu par acte notarié ou par acte sous seing privé. Toutefois, le mandat prévu au troisième alinéa ne peut être conclu que par acte notarié.

Article 477 of the French Civil Code

(English)*

Any person being a major or emancipated minor that is not subject to a judicial guardianship may instruct one or several persons, by the same power of attorney, to represent him or her in the event that, for one of the causes provided for in article 425, he or she is no longer able to provide alone for his or her interests.

A person under judicial guardianship may enter into a *mandat de protection future* solely with the assistance of his or her judicial guardian.

The parents, or the surviving father or mother, not being subject to any judicial guardianship, and exercising parental authority over their minor child or assuming the material and affective needs of their child may, in the event that their child is no longer able to provide for his or her interests alone due to one of the causes provided for in article 425, appoint one or several attorneys-in-fact to represent him or her. This appointment will take effect as from the day upon which the *mandant* (the person that grants the *mandat* or power) were to die or is no longer able to look after the interested party.

The *mandat de protection future* may be concluded by a notarized deed or by a deed under private seal. However, the *mandat de protection future* set out in the third paragraph hereinabove may only be concluded by a notarized deed.

*Because it is extremely difficult to translate legal concepts from one legal system to another, this English version of Article 477 does not claim to be exhaustive and is provided solely for ease of reference to a non-French-speaking reader. This translation should not be relied on in a specific matter relating to French law, but instead formal advice should be sought from a practicing French attorney.

(management account) must be drawn up and the *juge des tutelles* can have these accounts checked at his or her discretion. The judge can either call for the papers and conduct a review by herself or appoint an external CPA. The initial inventory and its updates, as well as the annual management accounts and accompanying vouchers, are required to be lodged each year with the *juge des tutelles* or the public prosecutor. In addition, management accounts must be available to the *juge des tutelles* for a period of up to five years after the end of the *mandat de protection future*. Actions undertaken by the *mandataire* during the course of the *mandat de protection future* can be reversed in the event that such actions manifestly fail to be in the interests of the *mandant*. Such issues can be brought to the attention of the *juge des tutelles*, who may then take the appropriate steps. In addition, any third party

who is able to show an interest at law can also bring suit.

Compared to the *mandat de protection future* under private seal, there is a clear advantage to entering into the *mandat de protection future* as an authentic deed before a notary: it may be used to grant powers of management, administration, and disposal of property to the *mandataire* so appointed. Contrary to the notarized power, however, the *mandataire* can rely on the *mandat de protection future* under private seal only for the day-to-day management and administration of property; but any act of disposal (or for that matter any other act not set down specifically in the *mandat de protection future*) must be authorized by the *juge des tutelles*.

An additional advantage to entering into a *mandat de protection future* as an authentic deed before a notary is that the initial inventory and its updates, as well

as the annual management accounts and accompanying vouchers, are held by the notary. The notary is required to bring to the attention of the court any unjustified movement of funds as well as any action that does not appear to be in the interests of the *mandant*.

How Does the *Mandat de Protection Future* Come to an End?

The usual circumstances under which a *mandat de protection future* comes to an end include the following: (1) the *mandant* recovers his or her faculties, (2) the death of the *mandant*, (3) the death of the *mandataire* or his or her replacement by the Court of Protection, (4) the removal of the *mandataire* by the *juge des tutelles* under a petition by any interested party, (5) the circumstance in which it is no longer necessary to protect the *mandant*, for example, if he or she recovered completely from an illness, (6) when matrimonial property settlement rules constitute sufficient protection of the *mandant* (which might be determined by the *juge des tutelles* or the Court of Protection), or (7) when the *mandat de protection future* is deemed not to be in the best interests or be to the detriment of the interests of the *mandataire*.

In the event that the court is petitioned to bring the *mandat de protection future* to an end, the court can substitute a measure of legal protection or add such a measure to the existing *mandat de protection future*. The court also can extend the scope of the obligations of the *mandataire* beyond those set out in the *mandat de protection future*.

In summary, the recent amendment to Article 477 of the French Civil Code has introduced a new procedure called the *mandat de protection future*. The *mandat de protection future* is a new and powerful tool that can be of assistance in many situations for a person who may be confronting questions in connection with potential incapacity and who either owns property in France or has loved ones in France requiring long-term care solutions. ■

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