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Legal brief *

Vol. 3

Number 17

November 2010

SHOULD YOU PREPARE A MANDATE IN THE EVENT OF INCAPACITY?

With our aging population and increasing life span, there is, unfortunately, a very real possibility that we will suffer an illness or accident. Should you prepare a mandate in the event of incapacity? If your faculties were to be affected, could you still have a say over decisions regarding you? Would your degree of incapacity be taken into account?

THE FACTS

The appellant had been a widow since 2001. Over the years, she had sold certain immovables and had substantial savings and investments.

In 2002, she had signed a notarial mandate in the event of incapacity that covered all her property as well as her person.

In 2003, her general physician had diagnosed her to be suffering from mild Alzheimer's disease. In 2008, the Superior Court had declared that she [TRANSLATION] "has a significant and permanent partial incapacity that risks becoming worse."

THE ISSUE

The appellant appealed a judgment rendered in June 2008 by the Superior Court which had homologated her mandate in the event of incapacity.

Given that the trial judge had found the appellant to be partially incapable, had he been entitled to homologate the mandate which applied in the event of total incapacity?

Had the judge of first instance been justified in homologating the mandate in light of the appellant's partial incapacity and the absence of a motion to open a protective supervision regime?

THE DECISION

The appeal was allowed, the judgment was overturned and the case was sent back to the Superior Court in order to consider the opening of a protective supervision regime.

THE GROUNDS

The Court of Appeal examined the opposing currents of opinion, both in the caselaw and the doctrine, regarding the homologation of a mandate in the event of a partial incapacity. The first current of opinion is to the effect that [TRANSLATION] "if the degree of incapacity is not proportional to the scope of the powers conferred in the mandate, the judge must refuse the homologation and order the opening of a protective supervision regime."

The second current of opinion considers that the mandate must be homologated in its entirety, without having to assess the degree of incapacity, given that, at the time she signed the mandate, the mandator was: [TRANSLATION] "[...] able to express her desire to entrust her protection and the administration of her property to those she wanted and with the powers she wanted".

According to that current of opinion, the only criterion for homologating a mandate is incapacity, regardless of its extent.

However, in the case at hand, the Court of Appeal followed the first current of opinion, because it considered that in the circumstances, the homologation of the mandate in the event of incapacity had been disproportionate in light of the actual incapacity of the person in question. The Court of Appeal considered that the trial judge had erred [TRANSLATION] "by not giving sufficient importance to protecting the appellant's autonomy."

The Court of Appeal, in a judgment written by Mr. Justice Robert, stated the following: [TRANSLATION] "...I am of the opinion that a court acts against the desires of an individual by homologating a mandate in the event of incapacity against the will of the mandator, when this will is clearly expressed and the circumstances indicate that the homologation is disproportionate in light of a state of partial incapacity. Homologating a mandate in the event of incapacity in such a situation is to thwart respect for the individual's residual autonomy."

Reference

L.P. v. F.H., Court of Appeal (C.A.) Montreal 500-09-018783-084, 2009 QCCA 984, May 19, 2009, Judges Robert, Pelletier and Hilton.(www.jugements.qc.ca)

The jugement discussed in this article was rendered based on the evidence submitted to the court. Each situation is unique. If in doubt, we suggest you consult a legal aid lawyer.

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