



Berner Fachhochschule

Soziale Arbeit

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**Possibilities for Mandating a Natural Person or
Legal Entity in Case of Incapacity in the Revised
Law for the Protection of Adults**



SWISS FAMILY LAW

Dates of Revisions

- 1973 New Adoption Law
- 1978 New Children 's Law
- 1980 New Marriage Law
- 2000 New Divorce Law
- **2013** **New Protection of Adults Law**
Replacement of the Guardianship Law of 1912



NEW ADULT PROTECTION LAW

Two of the Fundamental Goals for Revision

- Safeguarding and fostering the self-determination of vulnerable, assistance-dependent persons.
- Flexibility of governmental assistance.



NEW ADULT PROTECTION LAW Fostering the Right of Self-Determination

The Mandate in Case of Incapacity

Art. 360 Swiss Civil Code

A. Principle

1 Any person capable of making a rational judgment may mandate a natural person or a legal entity, in the event of becoming incapable of making a rational judgment, to provide personal assistance, manage his/her assets, or represent him/her in legal dealings.



NEW ADULT PROTECTION LAW Fostering the Right of Self-Determination

The Mandate in Case of Incapacity

2 He/she shall define the tasks that he/she intends to confer upon the agent and may give instructions for the performance of the tasks.

3 He/she may make substitute dispositions in the event that the agent is unsuitable for the tasks, declines or terminates the mandate.



MANDATE IN CASE OF INCAPACITY

Looking at Canada

- The idea of a *Mandate in Case of Incapacity* is not new:
A „*mandat donné en prévision de l'incapacité du mandant*“ has been known in the Province of Quebec since 1990.
- The instrument has proven worthwhile in Quebec:
In 2009, there were 9061 certified mandates.
- Based on the available statistics the mandates were mainly regarding **personal assistance and asset management of persons over 80.**



MANDATE IN CASE OF INCAPACITY **Possibilities and Chances**

The *Mandate in Case of Incapacity* can also become a model for success in Switzerland, if:

- Governmental agencies and private organizations are ready to actively promote and recommend the new law.
- Persons who want to establish a *Mandate in Case of Incapacity* receive counseling and support.
- Private service organizations are available to assume mandates as a legal entity.



MANDATE IN CASE OF INCAPACITY

Three Hypotheses

- The Mandate in Case of Incapacity is, as a law, suited to grant persons increased **self-determination**, in the event of their loosing their cognitive abilities.
- Provisions for personal assistance and asset management that are part of a mandate in case of incapacity, will probably pre-empt a governmental intervention. **Easing the tasks** in the context of elder care should not be underestimated.
- The mandate in case of incapacity is also an instrument **for conflict prevention**. The dispositions made by the concerned person when still capable of making rational judgments, establish binding clarity and can relieve relatives from any responsibility in ethically difficult questions that would otherwise overwhelm them.

