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# Extrajudicial mandates: Anticipating and protecting

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# Introduction

- Importance of anticipating contingencies in life.
- Target audience: European officials with cross-border needs.
- Objective: Understand and draft appropriate terms of reference.

# What is an extrajudicial mandate ?

- **Definition:** Statutory provision for delegating management in the event of incapacity, in Belgium, Law of 17 March 2013, in force since 1 September 2013, which introduced the extrajudicial protection warrant in Articles 489 to 490/2 of the former Civil Code. Density: priority given to the advance organisation by an adult of his or her own protection: it is the first one and moves forward to that of the judge.
- **Advantages include:** greater versatility and flexibility in relation to judicial protection. It makes it possible to prevent an 'unknown' professional administrator from becoming involved in the management of assets.

# What is an extrajudicial mandate ?

## ■ Objectives

- **Personal acts:** care, residence. Certain highly personal acts are excluded (e.g. the trustee will never be able to sign a will for the mandator) as well as acts excluded by the provisions of a special law (*lex specialis derogat generali*)
- **Property transactions:** financial management, donations (but attention should be paid and a special mandate should be drawn up).



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## Who may be appointed as an trustee

- The trustee is normally a family member
- But also a third party.
- **Council:** provide for a replacement representative in case a conflict of interest arises (especially in the first case). Otherwise, he or she will be appointed by a Justice of the Peace upon request



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When the  
extrajudicial  
mandate enters  
into force

■ **There are two options:**

- **Immediately**, when it is signed and will first be a general mandate and then switch to the out-of-court warrant, if the trustee becomes incapable.

- **At the time when the trustee becomes a vulnerable person** but this must be attested to by one or more medical certificates. The intervention of the Justice of the Peace is not necessary, unless provided for in a clause of the mandate.



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When the  
extrajudicial  
warrant enters  
into force

- **Council:** establishing the warrant by authentic instrument will ensure that the extrajudicial warrant is effective if documents on immovable property are to be put in place.
- However, it is always possible to issue an extrajudicial warrant by a private testament (without the involvement of a notary). In order to be valid, it will be necessary to register this mandate at the Registry of the Justice of Peace.



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## Control system on the trustee

- **Two control systems are possible:**

Presentation of the accounts

Power of review and injunction by the  
Justice of the Peace

- **Council: these are a posteiori control mechanisms, the effectiveness of which is limited,** so provide for a system of a priori control.



# European comparison

- **France:** Future protection warrant (judicial validation).
- **Germany:** Vorsorgevollmacht (private agreements).
- **Spain:** Preventive power of attorney (legal flexibility).
- **Not** all Member States give priority to voluntary protection, in some Member States judicial protection still prevails. Some Member States by, for example, Portugal, while having signed the Hague Convention of 13 January 2000, on the international protection of adults, expressly excluded accession to the extrajudicial warrant.

# European comparison

- Importance of courts according to residence. The powers of the trustee will in principle be identified in accordance with the law applicable in the country of main residence when the mandate is drawn up.
- However, express derogations are possible in the mandate, for example: reference to the legislation of the country where the property is located, *locus rei sitae*.
- **Council:** thoroughly analyse the applicable systems in the abstract and choose the national law that best suits your interests.



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## The end of the extrajudicial mandate

- **The extra-judicial term of office may end:**

- In the event that the mandator recovers
- Replacement of extrajudicial protection by judicial protection
- If the mandator dies
- Revocation ad nutum by the trustee

# Current Problems and Risks

- **Standardised models not suitable.**
- **Conflicts of jurisdiction:** Main residences vs secondary residences. Applicable law to be identified according to the rules of private international law: national law applicable where the capacity of the principal at the time of signing the warrant is at issue (Brussels Ia Regulation, Rome I Regulation), the Hague Convention of 13 January 2000, applicable in Belgium since 1 January 2021 (essentially Articles 15 and 16) on the international protection of adults applicable in order to identify which acts of the trustee bind the mandator (e.g.: donation, possible in Belgium but excluded in France, what if the warrant is to be executed in France?)



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# Current Problems and Risks

- **Family disputes:** In order to prevent conflicts, it is important that the trustee obtain from the competent authorities a certificate indicating their status and the powers conferred upon them. Thus, the status and powers indicated in the certificate are to be held on the date of the certificate, unless proved otherwise.
- **Impact of poorly written mandates:** financial blockages.

# Practical tips

- Involve the family to reduce disputes.
- Work with a specialist notary or lawyer.
- Include detailed clauses (finance, donations).
- Review the mandate periodically.
- In the event of delayed entry into force, provide that the trustee must be able to produce a medical certificate showing that the mandator is no longer fit



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# Return to persons who have used an extrajudicial mandate

From Perrine Le Maignan  
– USB –

- **Case 1:** Incomplete mandate leading to bank blocking.
- **Case 2:** Replacement of a professional representative
- **Case 3:** Trustees delegating their tasks
- **Case 4:** Family conflict
- **Conclusion at the social level** of the need for the extrajudicial mandate



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## Case 1: Banking problem

### ■ **Background**

- Principal domiciled in a European country but living in Belgium.
- Authorised representatives: Married couple living in Belgium, non-Belgian, with emotional and religious ties (sponsor).
- Assets and bank accounts located in the country of domicile.

### ■ **Problem encountered:**

- Difficulties in unlocking funds (life insurance).

### ■ **Answer:**

- Repurchase of life insurance:
  - Must be given by the principal or by means of a special mandate detailing the operation.
  - Limitation: Authorised representative may only make partial, non-integral buy-outs.





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## Case 2: Replacement of a professional representative

- **Background**

- Nursing home had suggested a professional representative to manage the invoices.
- Mandate including extensive powers (donations, execution of a will).

- **Problem definition:**

Loss of confidence

- **Resolution:**

Replacement by a close volunteer.



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## Case 3: Trustees delegating their tasks

### ■ **Background**

- A nursing home offering an out-of-court agent to manage the principal's affairs.

### ■ **Problem definition:**

- The principal expressed a fear
- Her state of health was limited

### ■ **Resolution:**

- At the request of the principal, the family living on another continent was informed of the situation.
- 2 family members became proxies.
- Tasks delegated by the family to the initially proposed representative, who has become the service provider.
- The family was able to keep control of what assured to the principal



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## Case 4: Family conflict

- **Background**
- Principal in Belgium (non-Belgian).
- Trustees in two other European countries (family link).
- **Problem definition:**
- Family conflict before the signature of the mandate.
- Justice of the Peace appoints an administrator of the property.
- **Consequences:**
- Protected person subject to the decisions of the administrator and the judge.
- Family and protected person lose.



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# Teaching

- Efficiency and user satisfaction,
- Importance of communication with relatives in preparation,
- Ensure that mandates are complete with clear roles between proxies where there are more than one;
- Wide range of customisation options for tailor-made packages

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## Social interests of the extrajudicial mandate

- 1. Preservation of legal capacity and autonomy for as long as possible
- 2. Prevention of judicial measures
- 3. Compliance with anticipated choices
- 4. Support in the management of financial and administrative aspects
- 5. Strengthening legal protection
- 6. Better coordination with social services

In short, the extrajudicial mandate promotes a preventative and personalised approach, while protecting the interests of the person and their relatives by reducing the administrative burden for relatives and public services.



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# Resources

## Documentation

- [Protective devices in Europe](#)
- [Le mandat de protection extrajudiciaire - Notaire.be | Famille - Notaire.be](#)
- Life Testament
- [Les déclarations de volonté anticipées | Famille - Notaire.be](#)

## First-line legal consultations

- [Legal defence – Union Syndicale](#)
- [Legal advice \(europa.eu\)](#) (only with EU-Login)

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# Questions Answers

You can ask your questions in the chat in French or English.

We will select the questions based on our ability to respond in a short time.

In case your question is not selected, check in the proposed resources the different possibilities to find answers. We thank you in advance for your understanding.