YOUR WEALTH

NOVEMBER 2008
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MESSAGE FROM THE PUBLISHER

Settling a succession is a delicate and complex process involving finances, family and feelings. We have all heard about families who have been torn apart by a difficult succession.

In fact, according to results of a recent survey commissioned by the Chambre des notaires du Québec, one out of five Québec families has experienced conflicts following the settlement of a complicated estate. The same survey revealed that six out of ten Quebecers admit to having made no specific arrangements as to the distribution of their property and assets in the event of death. This can be the perfect recipe for a family battle!

There are many myths and misunderstandings surrounding the settlement of an estate. The various rules and steps imposed by law to liquidate a succession are time consuming and poorly understood by the general public. A professional is often needed to smooth out the process, protect the interests of the heirs and ensure that the deceased's final wishes are respected.

Do you have questions about the distribution of property in the event of death? The role of the liquidator? Tax compliance? Making an inventory? And in a common-law marriage, whether you would inherit the property of your deceased spouse? These articles should provide you with all the answers.

I hope you find this publication helpful and stimulating.

Denis Marsolais, notary
President
Chambre des notaires du Québec

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MY WILL BE DONE

Many people are reluctant to talk about topics like succession, inheritance and their will. These stand as grim reminders of the inevitability of death, both our own and that of our loved ones, and the grief that comes with it. As 42 year old Martine found, when dealing with the loss of her father Lionel, it can be difficult and painful settling a succession without a will. In her case, she lacked a written record of his last wishes. It might have helped her avoid the subsequent clash with his de facto wife, the only grandmother her children had ever known.

Luce Desaulniers of the Université du Québec à Montréal is an anthropologist specializing in issues related to death. She has studied the significance of the will both in the individual mourning process and in society as a whole. Although the legal and administrative requirements of a will add considerably to the complexity of the bereavement process, she says, her research has shown that there is a deeper and lasting significance to the gesture.

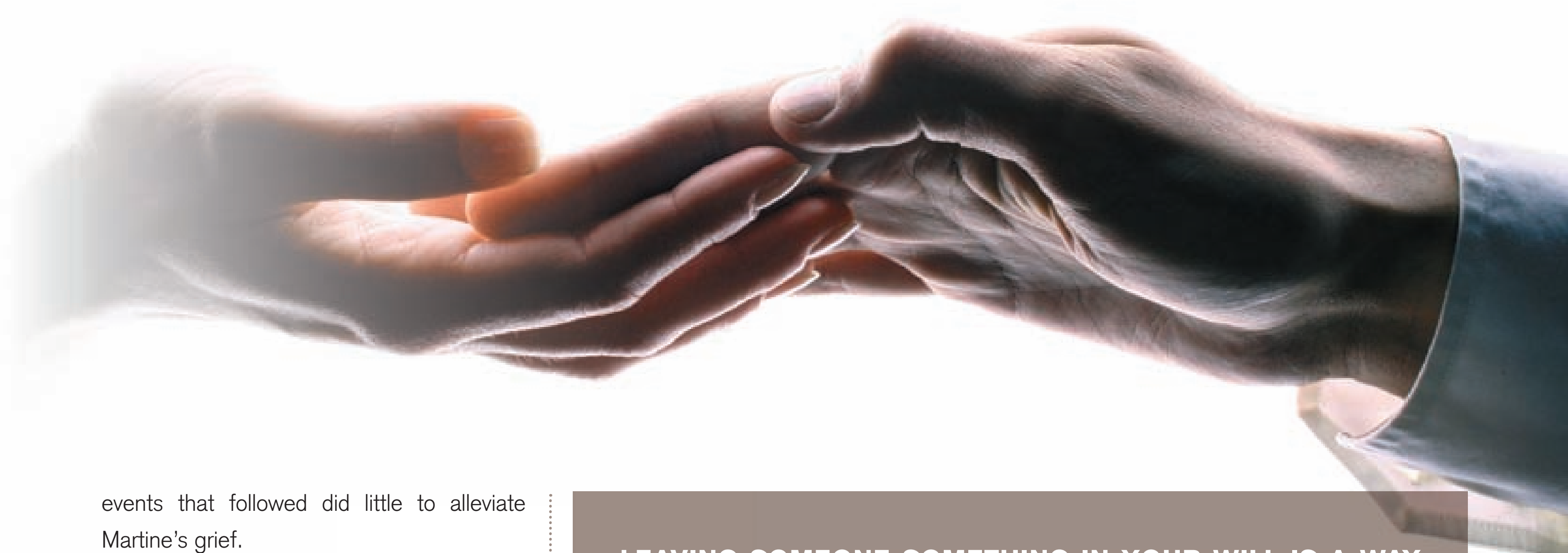
"Leaving someone something in your will is a way of showing them how important they have been to you," says Desaulniers. "In a way, it's an acknowledgement of the relationship you have shared. It is very important from a symbolic perspective and, for some, it can even help ease their loss."

Despite this, many people, for whatever reason, do not feel compelled to prepare a will. Perhaps some are clinging to the unrealistic notion that if they avoid talking about death they can prevent it from happening. Desaulniers maintains that this attitude has much to do with our concept of time. "We are living in a society where people are absorbed by the present, she says. They refuse to think about the consequences that their actions may have on those around them later on or when they're no longer around. As a result, they don't feel the need to consider their personal or material legacy, let alone sit down and write out their will."

This is a fair description of the attitude adopted by Martine's father, Lionel. "If my father were still with us," she says, "he would probably repeat the same thing he told me for years: that there will be plenty of time to talk about death when he is old and sick. The problem is that he never imagined that his heart would suddenly give out on him while he was driving back from a round of golf one Saturday morning. He always thought that was the kind of thing that happened to other people, not him."

Sadly, that is precisely what happened. Lionel was rushed to the hospital but succumbed to the heart attack shortly thereafter. Martine's world was turned upside down. "My mother died when I was twelve, and I was an only child. My father was my entire family. When his partner Jeannine called me to tell me he was gone, I didn't want to believe her," she recounts with a tremor in her voice. The

WILL HELP EASE THEIR LOSS



events that followed did little to alleviate Martine's grief.

Thrust into the funeral preparations, she quickly realized that, despite her discussions with her father, he had left no indications as to his last wishes. "There I was, in a state of shock, at the funeral home with my father's partner, picking out a casket and working out the burial details. It was surreal. There were so many decisions to make. She seemed to be in such control that I pretty much gave her free rein over the situation. After all, I thought, she had been living with my father for eight years, so she must have had a fairly good idea of what he wanted."

Once the funeral was over, however, Martine was once again confronted with reality. The notary informed her that, because her father did not have a will, his successors would be determined according to the provisions of the *Civil Code of Québec*. Although her father had been living with his partner for eight years and they were co-owners of their condominium, Martine was considered his sole legal heir. His savings, investments, boat and even half of the condo were hers. "Jeannine, my father's partner, was furious. I don't think I'll ever forget the rage she flew into at the notary's office. It's a good thing I had had the bright idea to invite her to hear in person what the notary had to say. I don't even want to think what would've happened otherwise."

LEAVING SOMEONE SOMETHING IN YOUR WILL IS A WAY OF SHOWING THEM HOW IMPORTANT THEY HAVE BEEN TO YOU. IN A WAY, IT'S AN ACKNOWLEDGEMENT OF THE RELATIONSHIP YOU HAVE SHARED. IT IS VERY IMPORTANT FROM A SYMBOLIC PERSPECTIVE AND, FOR SOME, IT CAN EVEN HELP EASE THEIR LOSS.

Martine eventually managed to settle the succession and work out a compromise for the condo. "I really sympathized with Jeannine's frustration, but the law was very clear. All of a sudden, half of the condo was mine. In a way, we were both victims of my father's negligence. Everything would've been so much easier if he had just accepted his responsibilities and prepared his will."

WILL... OR WILL NOT

Although wills generally do simplify matters, they are not absolutely fail-safe. André knows this all too well. Five years after the death of his mother, he and his only brother, Michel, have still not said a word to each other. "Michel was the liquidator of the estate, and when it came time to settle the succession, he cut off all communication with me. From the moment he found out that Mom had appointed him to be the liquidator, he clammed up. There was no way to talk to him or get any information from him. I never thought he would react that way."

In the end, André went to court to find out the contents of the will, and was informed of his mother's desire for her goddaughter, Isabelle, to inherit part of her assets. "Isabelle's parents died when she was very young. She grew up with us and was raised by my parents, along with my brother and myself.

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WE HAVE NO CONTROL OVER DEATH, BUT WE CAN, FOR THE MOST PART, CONTROL ITS CONSEQUENCES. THOSE WHO HAVE TAKEN THE TIME TO PREPARE A WILL AGREE: THERE IS A REAL PEACE OF MIND THAT COMES FROM KNOWING YOU HAVE DONE YOUR DUTY AND HELPED ENSURE THAT THE PEOPLE YOU LOVE ARE TAKEN CARE OF, EVEN AFTER YOU'RE GONE.

When my mother died, my brother pretended that Mom hadn't left her anything. I found that impossible to believe. My mother would be very sad to know that my brother and I are no longer on speaking terms, but I am sure she'd be even more shocked to find out that in his power trip, Michel decided to act as if Isabelle didn't even exist. She loved Isabelle like a daughter. If I had to do it all over again, I would do exactly the same thing."

Fortunately, not all succession settlements resemble trench warfare. For the Tremblay family, the process actually brought them closer together, even though, with 13 children around the table, things could have easily gone sour. "When Dad died," says Luce Tremblay, "my brother Jean took control of the situation, with the help of a notary. My father had chosen him to be the liquidator. When I see how well it all turned out, I think that, even from his grave, Dad was doing everything he could to protect us against the worst. Jean quickly suggested that we all be present at the notary's office when the will was read. We were able to ask all the questions that came to mind and we left feeling reassured. In the end, the only thing left to do was to thank him for the time and energy he spent making sure it all went smoothly."

It is important to point out that Pierre Tremblay had left no stone unturned. Much of the furniture, jewellery and other family property had been specifically bequeathed to each of the children, along with a special anecdote. "Right down to his wedding pictures," chuckles Luce. "It was almost compulsive, and we had a good laugh about it because we knew that it had been his idea to do it like that. It was so him. We spent two days emptying out the family home and respected his wishes to the letter—no arguments. Instead of fighting about the wedding ring, we boiled up some corn and reminisced. Sure we were sad, but we were sad together. It made the loss a lot easier to bear."

Luce Desaulniers confirms that, even though it can be a difficult experience, the distribution of property following a death can bring a family closer together. "I always tell people, if you want your personal legacy to live on, make sure you take care of your material legacy first. With a will that is clear and fair, you are free to focus your mental energy on the relationship you had with the deceased. It brings people closer together and facilitates the healing process. Death is one of the most devastating experiences in life. You can help those you leave behind to cope with the loss by preventing problems before they happen and putting your affairs in order so that the process goes as smoothly as possible. We have no control over death, but we can, for the most part, control its consequences. Those who have taken the time to prepare a will agree: there is a real peace of mind that comes from knowing you have done your duty and helped ensure that the people you love are taken care of, even after you're gone." ■

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THE RIGHT SUPPORT **AT THE RIGHT TIME**

After her husband died, Chantal decided to take a month away from her work as an accountant and tackle his estate on her own. “I spend my days working with numbers and forms, she says, and I thought I was the best person to take care of everything. But I underestimated what was involved. After two weeks, I was exhausted.”

There is nothing particularly tricky about doing the administrative work and settling an estate. It’s a step-by-step process. After devoting the required time and effort to the task, a number of people people successfully settle estates every year without any professional help. Naturally, every situation is different, but it is crucial to stay on top of the various legal considerations to avoid undesired outcomes both in terms of fiscal and civil responsibility.

“For many, however, the process saps them of all their energy,” says Luce Desaulniers, an anthropologist specializing in death and grief. “With so many pieces to figure out in the bureaucratic puzzle, liquidators can become very frustrated and displace their true feelings of grief. In fact, several people in this position mention that they feel they have been robbed of the mourning process.”

WHEN A LOVED ONE DIES, THE FAMILY IS USUALLY RUNNING ON EMPTY. THEY ARE EMOTIONALLY SPENT AND, MOST OF THE TIME, DON’T HAVE THE STRENGTH TO DEAL WITH FORMALITIES AND LEGALITIES. GOOD ADVICE IN THIS CONTEXT IS INVALUABLE BECAUSE IT SAFEGUARDS EVERYONE’S INTERESTS AND LETS YOU HAVE SOME TIME TO YOURSELF.

To protect yourself and prepare for any emergencies that may arise, notary Danielle Beausoleil strongly recommends seeking out the services of a professional. “When a loved one dies, the family is usually running on empty. They are emotionally spent and, most of the time, don’t have the strength to deal with formalities and legalities. Good advice in this context is invaluable because it safeguards everyone’s interests and lets you have some time to yourself.”

Her fellow notary Manon Tousignant agrees. “Settling an estate is often an enormous undertaking for those who are not familiar with the law. Many mistakes can be made along the way. By consulting a professional, at least once at the beginning of the process,” she adds, “you can put things in perspective and better understand what lies ahead, if you are a liquidator, for example.”

It is important to understand that everything a liquidator does can have a lasting impact. “Sometimes,” explains Danielle Beausoleil, “the simplest and most natural gestures, such as paying rent due, can have far-reaching consequences and make it impossible for you to refuse to take on a debt-ridden estate later on down the road.”

Notaries are often called upon to help write wills and they have made estate settlement one of their specialties. Not only can notaries provide legal counselling in this regard but they can also oversee the entire liquidation process. “Three-quarters of estates are settled without too many snags, but for the other quarter, it’s a different story altogether,”

says Tousignant. “In this situation, having someone in your corner with the necessary expertise and know-how can give you the peace of mind you need.” ■

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Quebecers and the Settlement of an Estate

POOR PREPARATION

Quebecers do a poor job of preparing their succession. This is the main finding of a survey conducted in October by Ipsos Descarie for the Chambre des notaires du Québec. The survey also reveals that Quebecers are unaware of the potential difficulties they might encounter when settling the estate of a loved one.

A will, heirs, tutors … Quebecers put little thought into matters related to their estate, even when children are involved. In fact, only one out of three Quebecers (36%) considers that their succession is well prepared. The survey indicates a slightly higher degree of planning (45%) among adults with children. This said, in spite of greater awareness among parents, less than 49% of Quebecers with children have a notarized will. And surprisingly, less than half of Quebecers who have a will have told their heirs where it is located. In other words, results showed that a high number of Quebecers are unaware that they are bequeathing a legacy of problems because of poor estate planning.

In fact, the Ipsos Descarie survey shows that badly planned estates can in many cases tear families apart. In concrete terms, one out of every five Québec families (19%) has experienced conflicts following a difficult succession. In most cases, the negative fallout is felt long after the conflicts are resolved. The results of the survey reveal that most of the problems encountered are related to the distribution of the deceased's property and assets.

Another interesting finding is that the value of the succession has no real impact on how smoothly the settlement goes. This underscores the importance of good planning, even for a small succession. The average value of an estate among respondents was $110,271. In 36% of cases, however, it was less than $20,000.

HELP FOR LIQUIDATORS

While few people put their final wishes on paper, many are called on at some point to play a more or less active role in settling an estate. According to the Ipsos Descarie survey, one out of three Quebecers has been involved in a succession, as an heir or a liquidator. More than one in six Quebecers has been a liquidator and one in three will become one in their lifetime. Because settling an estate is a delicate and complex process, more than half of respondents who have acted as liquidators turned to a professional for help. Findings show that a majority (53%) of those who sought out the services of a notary feel that involving this professional made the settlement process easier.

By the same token, the survey reveals that the presence of a notarized will goes a long way in easing the settlement of an estate. More specifically, in cases where the deceased left a notarized will, 67% of liquidators feel that the process was simple. This percentage drops to 57% in cases where there was no notarized will. Clearly, the notary appears to be an ally of choice in facilitating the settlement of an estate. Most Quebecers (53%) willingly stated that they would contact a notary to answer their questions if called upon to liquidate a succession.

A MATTER OF AWARENESS

The survey also shows that there are many myths and misunderstandings surrounding the settlement of an estate. In fact, only

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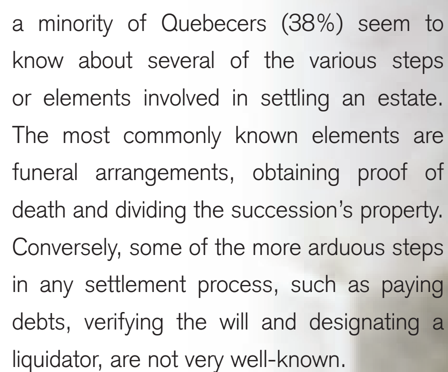

a minority of Quebecers (38%) seem to know about several of the various steps or elements involved in settling an estate. The most commonly known elements are funeral arrangements, obtaining proof of death and dividing the succession's property. Conversely, some of the more arduous steps in any settlement process, such as paying debts, verifying the will and designating a liquidator, are not very well-known.

Many preconceived ideas also persist around these issues. The survey shows that 30% of respondents believe heirs can never be held responsible for the deceased's debts. Almost 80% do not know that heirs have six months to accept or renounce a succession. Finally, the vast majority of those surveyed (72 %) still believe that the reading of the will in front of the heirs is obligatory, which is not the case.

A total of 1,105 Quebecers aged 25 to 74 took part in the survey. ■

POOR
PREPAR

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NO WILL, **NO WAY?**

Every year, a number of people die without leaving any details as to their last wishes. Without a notarial or other will containing instructions on how the deceased's property is to be divided, families must turn to the law. Here is a brief overview of the rules that determine who gets what.

Notary Renée Lebœuf notes that she is called upon to settle a number of legal successions without a will (also referred to as an "intestate succession") every year. The same conditions apply every time, she says. "When it comes to the order of devolution of successions, the *Civil Code of Québec* could not be clearer."

The first step involves determining marital status. If the deceased was married or in a civil union, it is necessary to partition the family patrimony– unless spouses are excluded from the application of these provisions– and settle the matrimonial regime (see "United in Life, and in Death?"). Once this is done, it is possible to identify the property that belongs to the succession, which will eventually be divided up among the successors, in accordance with the law.

"Once again, says Lebœuf, the rules are clear. If the deceased was married with children, his or her spouse inherits a third of the property, and the other two-thirds is divided up equally among the children. If there was no surviving spouse from a marriage or civil union, the children become the sole heirs."

The law has been formulated to try and cover every possible scenario. Accordingly, if there are no children and no spouse from a marriage or civil union, the deceased's brothers and sisters become the first successors, if there are no surviving parents. If there are no surviving brothers or sisters, the next in line under the law are their children. "Under these circumstances," Lebœuf explains, "someone who had been living in a de facto union with the deceased for 20 years would receive nothing at all and might even find themselves in a situation where they are suddenly co-owners of their own house with their nieces and nephews."

THE DESIGNATED LIQUIDATOR

Beyond determining who the successors are, the law can also identify who has the responsibility for settling a succession. "By default," explains notary Louise-Marie Lemieux, "when someone dies without leaving a will or appointing a liquidator, the role of liquidator falls to all of the heirs. In a family with five children, for example, each of them may assume liquidation responsibilities. In most cases, people agree to appoint a single liquidator. For this to be legal, however, it must be approved by the majority of the heirs."

Once the liquidator has been designated, he or she assumes all of the duties related to liquidating the succession. These powers,

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however, are limited in scope. While a liquidator appointed by will may act without the specific authorization of the heirs, a liquidator designated by the heirs may not.

"In some cases," says Lebœuf, "heirs grant limited power to a designated liquidator. For example, they allow the liquidator to administer property but not to sell or dispose of it. In such a situation, a liquidator could not, for example, decide to sell the deceased's house to pay off a debt. The heirs would have to sign off on the transaction first. This can make the process particularly complex and laborious. I generally advise heirs to give a designated liquidator full authority to facilitate the task and minimize the already numerous obstacles that come with settling a succession."

WITHOUT A WILL, THOSE LEFT BEHIND USUALLY FIND THEMSELVES IN A DIFFICULT POSITION. I THINK THAT IF PEOPLE COULD SEE HOW THE LACK OF A WILL AFFECTS THEIR LOVED ONES, MANY OF THEM WOULD CHOOSE TO DO THINGS DIFFERENTLY.

FIRST THINGS FIRST

Before a liquidator can even be designated, Lebœuf adds, the heirs must be aware of the consequences of this decision to designate. "From a legal standpoint, the simple act of appointing someone to be a liquidator means that the successors have exercised their right of option and accepted the succession and, in so doing, have become heirs. Once this decision has been made, there is no looking back. Whether or not the succession is solvent, heirs must carry out their responsibilities and, in certain cases—for example if the liquidator does not abide by the rules for liquidation of the succession—assume the corresponding debt."

In order to avoid being personally liable for the debts of the deceased, heirs must ensure they comply with the liquidation rules stipulated in the Civil Code. The liquidator is required, among other things, to make an inventory of the deceased's property. While assessing the property and debts, the liquidator can usually determine whether or not there will be any money left to distribute once all the bills are paid. In practice, this responsibility falls to the heirs, unless a liquidator is appointed to do so by the deceased or the heirs. The liquidator or the heirs may also request that the inventory be prepared by a qualified professional, such as a notary.

Another situation to consider, in accordance with the Civil Code, is when one of the heirs is a minor and the amount in question exceeds $25,000. The liquidator must notify the public curator of any such case. The parents of the minor heir will then be required to obtain the authorization of a tutorship council and/or of the court, as appropriate, in the course of the administration of the inheritance. A tutorship council must therefore be established to ensure the minor's property is protected.

This council is usually made up of family members, with the tutor being the surviving parent. Lemieux has worked with families in this kind of situation before. "Some real horror stories can come out of this scenario, with families tearing themselves apart or surviving spouses forced to go to court to obtain the authorization to sell the home they can no longer afford."

So what's the moral of the story? "Without a will, those left behind usually find themselves in a difficult position. I think that if people could see how the lack of a will affects their loved ones, many of them would choose to do things differently." ■

THE ROLE OF THE LIQUIDATOR: NO SMALL TASK

The liquidator can be a reliable family member, friend or professional whom you trust to act with integrity, honesty and diligence – someone who agrees to be your representative and ensure matters are dealt with fairly. The job can be quite straightforward or tremendously complex. But once it has been accepted, there is no turning back. Welcome to the world of the liquidator.

Previously referred to as a "testamentary executor," the liquidator plays a pivotal role in the settlement of a succession. "In concrete terms," explains notary Guylaine Goulet, Trust Manager, Individual Trust Services, at Desjardins Trust, "the liquidator is in charge of putting the affairs of the deceased in order and ensuring the smooth transfer of property to the heirs. The liquidator prepares the inventory of the deceased's property, tracks down all assets (bank/brokerage accounts, etc.) and administers them throughout the liquidation process, pays all creditors, files income tax reports and ensures that all of the heirs receive what is rightfully theirs under the terms of the law or the will."

Although each liquidation is unique, there are some common characteristics that make it possible to draw up a basic set of guidelines for the liquidator. It is important to remember that a liquidator should be familiar with a number of fields, including civil law, tax law, administration and investment management. He or she should have the time and inclination to interact with a wide range of people, including heirs who are still in a state of shock over the loss of their loved one, creditors looking for payment, financial institutions, employers, government agencies and so forth. That is why it can be useful in some cases to call upon the services of one or more professionals, depending on the complexity of the succession.

The liquidator's first duty is to oversee the funeral arrangements. "In many cases, the family takes care of this instead," explains Goulet. "If not, however, it has to be determined whether pre-arrangements have been made, by going through the deceased's papers. If a pre-arrangement contract is not found, the next step is to check with those who were closest to the person and verify certain key details and preferences, including the choice between cremation and burial. This can take a fair amount of detective work. If no information is found and there is no immediate family to consult, the liquidator must take care of all the details, right down to the floral arrangements for the casket. And, in some cases where there are no family members, the liquidator must even oversee the transportation of the remains of the deceased if he or she died in another country."

Most funeral homes will agree to issuing their invoice to the succession. If not, however, the liquidator may be required to pay the costs and be reimbursed by the succession or through a lump sum from the Régie des rentes du Québec (RRQ). "Depending on the circumstances, the RRQ can provide up to $2,500 to reimburse the person who paid for the funeral expenses," Goulet adds.

The liquidator must also obtain the official paperwork from the Registrar of Civil Status. Goulet points out that the liquidator needs to provide proof of death to any third parties holding assets on behalf of the deceased throughout the settlement process. "Funeral homes issue an attestation of death, but the official act of death is available only through the Registrar of Civil Status."

Another important responsibility is the will search. Say you have a copy of the deceased's will that names you as the liquidator. Are you sure it is the most recent version? That's where the will search comes in. "You need to check with the register of testamentary dispositions administered by the Chambre des notaires du Québec and the Barreau du Québec. You have to go through the deceased's personal belongings—papers, books, boxes, etc.—and examine the contents of any safety deposit boxes and so forth. The liquidator can do nothing beyond playing a purely protective role until it is absolutely certain that the most recent version of the will has been found. If the latest version has not been prepared by a notary, the liquidator needs to proceed with a verification of the will, as outlined in the *Code of Civil Procedure*, before it can take effect. Once that is done, the liquidator

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SMALL TASK

WILL

LIQUIDATOR

can contact the successors—those who are eligible to exercise a right of option and who must accept or renounce the succession. If there is no will, the liquidator must identify the successors based on the order of devolution prescribed by law."

"While all this is being done, the liquidator must deal with any emergencies that arise to ensure the deceased's property is protected. Are there any pets to consider? Is there someone to take care of them? Is there a business that requires immediate attention, like a farm? Obviously, the decisions made will be quite different if there is a surviving spouse or a key business partner around," says Goulet.

WHO CAN BE A LIQUIDATOR?

A liquidator can be appointed by the deceased through a will or, in the absence of testamentary dispositions to this effect, designated by the heirs. If the heirs do not come to an agreement in this regard, a liquidator will be appointed by the courts.

The liquidator will first have to partition the family patrimony and liquidate the matrimonial regime, if need be. Once this is done, he or she is responsible for making an inventory of the deceased's property by identifying all of the assets and liabilities, including taxes owed. The liquidator oversees the management of the patrimony throughout the liquidation process, ensuring that the deceased's wishes are respected. He or she

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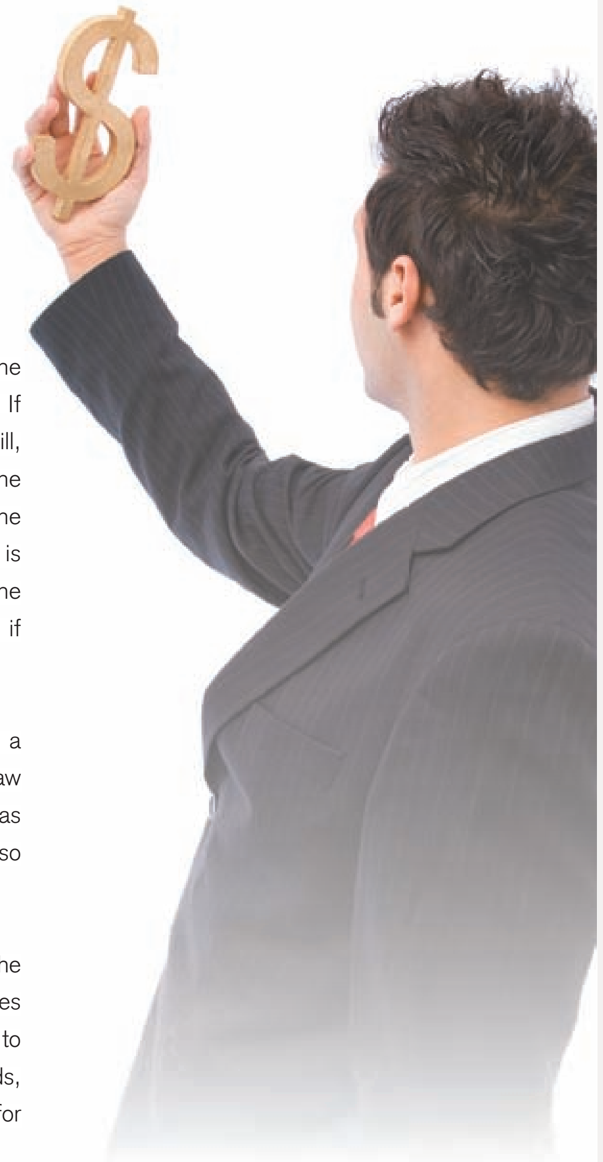

also pays all creditors and, finally, distributes property to the heirs, along with a liquidation report. "In a way, the liquidator is stepping into the deceased's shoes until the succession is settled. That is why," Goulet stresses, "it is important to have the utmost confidence in the person you choose."

That being said, nobody can be forced to take on the role, unless there is only one surviving heir. Goulet suggests that, to avoid any difficulties that may arise, it is a good idea to designate a substitute liquidator in the will to take over should the appointed person decline the role or step down while the process is under way. "The appointed liquidator may be out of the country or seriously ill when the deceased passes away," she explains. "A replacement is therefore a necessity."

The liquidator is entitled to be reimbursed for any expenses incurred as part of his or her duties. Under the law, the liquidator is also entitled to compensation if he or she is not one of the heirs of the succession. If the compensation is not set forth in the will, the heirs can determine the amount. In the event of a disagreement in this regard, the courts have the final say. If the liquidator is also an heir, compensation is possible if the will includes a provision to this effect or if the heirs decide to provide one.

In concrete terms, the liquidator may be a person or an organization authorized by law to administer the property of others, such as a trust company. For a fee, a notary can also act as a liquidator.

In conclusion, Goulet emphasizes that the liquidator must remain impartial at all times and avoid conflicts of interest. "In addition to outstanding organizational skills," she adds, "a liquidator must have a real knack for mediation!" ■

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MAKING AN INVENTORY A TEDIOUS **BUT ESSENTIAL STEP**

From funeral arrangements, to official proof of death, to the will search and emergency interim measures, the duties and responsibilities of a liquidator are many. And unfortunately there is no easy shortcut. Notary Manon Tousignant strongly advises liquidators to follow the Civil Code rules to the letter. Why? “It’s the only way to protect the heirs,” she warns. “By following all the steps in the Civil Code, heirs will never be forced to use their own property to pay off the debts of the deceased.”

Making an inventory of succession holdings is the pivotal step in liquidating an estate. “In addition to settling matters related to a lease, insurer or employer, the liquidator must establish the assets and liabilities of the deceased. This means knowing the person’s credit habits, investments, and debts and, if necessary, arranging for an appraiser in the case of artwork or a stamp collection, for example” she says. According to Tousignant, one can usually tell at first glance if an estate will be solvent or insolvent. “Sometimes the house will go to pay the debts of the deceased. In the case of a solvent estate, the creditors and legatees are paid afterwards,” she says. If the succession is insolvent, the heirs can renounce it.

To help our eventual liquidators do their job, notaries recommend filling out a document they call a patrimony balance sheet. In simple terms, it consists of putting together in one document all the information pertaining to one’s family patrimony assets: house, summer cottage, investments, and so on.

It is also recommended that you attach to the balance sheet all the important documents that concern you and your children if they are minors: will, life insurance policy, certificate of citizenship, cohabitation agreement, and so on. ■

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SPOUSAL RIGHTS
UNITED IN LIFE, AND IN DEATH?

Grief does not discriminate. Whether you are married or living in a de facto union, the death of a spouse is always a difficult event. The law, however, approaches the situation from a different perspective. Marital status changes everything.

Despite their 25 years of living in a de facto marriage, Monique and Jean-Louis never felt the need to formalize their union. They were financially independent, free and happy. Their happiness took a turn, however, when two years ago Jean-Louis did not return from his annual hunting trip. Without a will to ensure her rights, Monique's world and that of their three children was turned upside down. The children, one of whom was a minor, inherited everything, including the house. Monique had to deal with a tutorship council that was put in place to oversee the proper administration of the tutorship.

The Civil Code is precise on the matter. Regardless of how much time has elapsed since the cohabitation began, the survivor of the couple in a de facto marriage has no rights in the event of death. The surviving spouse is not automatically considered an heir. "People often think that they are protected," says notary Danielle Beausoleil. "The confusion arises out of the definition of the word *spouse* in social law. For example, the Régie des rentes du Québec or the Société de l'assurance automobile du Québec confers certain rights on de facto spouses after a few years of cohabitation. But it is important to remember that, under the Civil Code, de facto spouses are considered two strangers who owe each other absolutely nothing."

A will is the only way to reverse this situation. "The rule is simple," says Danielle Beausoleil: "Whatever we want to leave to our spouse, be it RRSPs, a house or summer cottage, it must be specified in writing in a will. Without a will, the law is applied, pure and simple, and the de facto spouse is left unprotected."

PROTECTING THE CHILDREN AS WELL

Protecting a spouse is one thing. Protecting children from a previous marriage is another matter. "For most heads of a blended family, things seem simple. They love each other. They love each other's children. Most arrive at the notary's office declaring that they want to leave everything to their spouse. But the truth is that things are a lot more complicated and they absolutely need to ask themselves certain questions," explains Beausoleil.

In her daily practice Beausoleil does not hesitate to question the initial intentions of the spouses. "Life being what it is, it's very likely that a person will some day end up beginning a new life after the death of a spouse. When that day comes, in spite of all the best intentions in the world, that person may no longer be as considerate of his or her late spouse's children's needs," she explains. "It's a normal part of being human. Spouses in a blended family need to be aware of this because it can have major consequences."

Given this, Danielle Beausoleil likes to remind her clients that what is bequeathed to a spouse will not necessarily be handed down later to the children. "If in my generosity I decide to leave the house and its contents to my spouse, believing that she will ensure that it all eventually goes to my children, I am mistaken. What is left to my spouse does not automatically go to my children upon his or her death. It has to be spelled out before the person dies."

WHATEVER WE WANT TO LEAVE TO OUR SPOUSE, BE IT RRSPs, A HOUSE OR SUMMER COTTAGE, IT MUST BE SPECIFIED IN WRITING IN A WILL. WITHOUT A WILL, THE LAW IS APPLIED, PURE AND SIMPLE, AND THE DE FACTO SPOUSE IS LEFT UNPROTECTED.

To address these various scenarios as smoothly as possible, Beausoleil admits to almost systematically turning to the testamentary trust.

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To a certain degree, the testamentary trust enables all of an individual's assets, i.e., house, investments, and so on, to be transferred to a sealed envelope that will be managed by one or two designated persons according to clear instructions. For example, a person might arrange for his or her spouse to live in his or her house for as long as this person wishes, without giving him or her outright ownership. The children, who are most often the designated heirs of the trust, would then be assured of being able to dispose of the house when they reach a specified age. "Proceeding in this way avoids abuses and unfair situations with children from a first marriage," says Beausoleil.

RECOGNIZED UNIONS

Obviously the situation is different for people who are married or in civil unions. Under the law, these individuals are liable to one another. For example, even if a person who is married or in a civil union does not make a will, the law provides that his or her spouse will inherit a third of his or her assets, i.e., home, investments, and so on, in the presence of descendants.

Once again, though, the situation can be more complicated if it is a second marriage and the children of the first marriage are still in the picture. "In the eyes of the law, the death of a spouse has the same effect as a divorce. In other words, issues related to the family patrimony and matrimonial regime must be resolved first," explains Danielle Beausoleil. "The assets of each spouse must be put on the table and divided equally. When a spouse dies without leaving a will, everything is left to the children. In this situation, even the best relationships can sour. People hate to put their worth out on the table, especially when they don't understand why they need to do this."

The only way to get around these problems is to prepare a will that clearly states that the spouse inherits all the assets and renounces the sharing of the family patrimony.

Sound complicated? Notary Beausoleil does not deny it. Regardless of one's marital status, settling a succession can become a high-wire balancing act. "It's best to turn to professionals who can advise and guide you, both after the death of a spouse and before, when it's time to put your intentions in writing." She insists that "The most important thing of all is to give yourself time. The worst that can happen if you decide to take a few weeks or months to allow things to settle down before dealing with a succession, is that interest will accrue. In the end, this pales in comparison to the pain and time needed to deal with the shock of losing a loved one." ■

THINKING ABOUT FAMILY MEDIATION?

HAVE QUESTIONS?

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Estate Mediation
FINDING THE MIDDLE GROUND

It is a well-known fact that settling an estate can rekindle resentment and old grudges. What can be done when disagreements arise between family members, foiling a satisfactory resolution for all the parties involved? There is one solution to break the impasse: mediation.

Based on conflict resolution techniques, succession mediation involves the intervention of a notary who is qualified in civil mediation. The notary helps the parties resolve their differences among themselves during a mediation session. "Notaries play a mediating role. They prepare the meetings between the parties, facilitate the discussions and ensure that communication flows properly. Basically, they give the parties the tools they need to find their own answers and resolve their disagreements amicably," explains notary Suzanne Hotte, who turned to this practice in the face of client demand.

For her, the real advantage of mediation is that all elements, both human and legal, are taken into consideration. "Sometimes people simply don't know their options," she says. "It's not always a case of disagreement but simply a lack of information." All the parties involved must, however, agree that mediation is necessary. "If mediation isn't given a chance, nothing will be resolved and, if nothing is resolved, the courts will decide. The court decision may not necessarily side with them. A cooperative effort is needed."

THE MEDIATION PROCESS

The first step is to arrange a preliminary meeting with each of the parties. "This meeting allows people to speak freely

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and to express the roots of the conflict, their expectations and the best solutions," explains Hotte. The process is then explained and the parties can decide at any time to continue with the mediation or not. Hotte asks them to come up with three possible solutions for the meeting. In preparation for the meeting, the mediator identifies the issues, looks into existing or potential conflicts, and prepares an agenda for the mediation session, which will take place over half a day. "The aim is to ensure that things are resolved by the end of the day," she adds. "The parties meet for three hours, then break for lunch to rest up, and return to end the day together."

The process is based on the approach of the Peace Institute, which helps children manage conflict. "Just as children learn to manage schoolyard quarrels, family members learn to manage succession disagreements. The process is the same: calm down, talk to one another, look for solutions together, and act on them. Parties discuss the issues, always in a calm and respectful manner, until they find the solutions. And it works!"

Hotte concludes that the advantage of mediation is that the result is without prejudice: offers are not binding, and the parties do not surrender their rights or recourse to the courts. If the parties do not reach common ground, the file is closed and remains confidential. They can then start from scratch if they go the route of the courts. She points out, however, that once an agreement is signed, it becomes legally binding and cannot be appealed or contested. ■

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Insurance and Succession
ONE SHARED GOAL, TWO REALITIES

The two most frequent actions taken by individuals wishing to ensure the future of their heirs are to make a will and to buy life insurance. In the minds of many people, the two are closely linked. But, in reality, they are not.

Monique Marsolais is a notary. Yet in the course of her daily practice, she finds herself explaining the rules governing life insurance. "Today I still come across successions where a woman, thinking that she is doing the right thing, buys a small life insurance policy and identifies her daughter as the beneficiary in order to provide her with the funds needed to pay for the funeral expenses. But it doesn't work that way," she explains.

Contrary to certain widely-held beliefs, insurance policies with a designated beneficiary are not part of a deceased's succession. They are the sole property of the designated beneficiary, be that a spouse, a child or even a friend. This person is entitled to use the funds received however he or she pleases and cannot be forced to share the money with the other heirs. A sole heir can renounce a succession that is deemed insolvent and still benefit from the life insurance policy.

As Monique Marsolais explains, "the only way to ensure that the proceeds of a life insurance policy will be used to cover funeral expenses is to name the succession as the beneficiary, since legally, it is responsible for these costs."

MINOR CHILDREN IN THE MIX

There are other circumstances in which the succession, rather than an individual, might be named as the beneficiary of a life insurance policy. This is notably the case with heirs who are minors. "Often when people divorce, they name their children as beneficiaries of their life insurance policy to replace their former spouse. It's completely legal, as long as you fully understand the implications," says Marsolais.

In concrete terms, while a parent can state in a will that the children may only access the funds once they reach the age of 25, for example, no similar measure exists with a life insurance policy. The child beneficiary has access to the full insurance amount when he or she reaches the age of 18. The only way to get around this is to integrate the insurance policy into the succession by making the latter the designated beneficiary. The will can then clearly state the age at which the child can access the insurance amount, along with the other assets.

According to Marsolais, making the succession the beneficiary of a life insurance policy where minor children are involved provides added protection. "If the insurance is payable to the succession and if the will states that the liquidator has power to administer the assets of a minor child regardless of the amount involved, a tutorship council does not need to be appointed and the former spouse will have no power over the assets. But when a minor is the beneficiary of a life insurance policy, the surviving parent does have power, in his or her role as tutor, to administer the funds and, if these exceed $25,000, a tutorship council made up of three persons must be named to supervise the tutorship." ■

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Insurance and Succession

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Reading of the Will
OPTING FOR TRANSPARENCY

For some years now, notaries have been proposing the reintroduction of a very useful practice in settling successions: the reading of the deceased's will to the heirs. Adding this simple clause to the will has proven its worth time and time again in the past. Not only can it foster a better climate of trust among the deceased's heirs and loved ones, but it can go a long way to ironing out the problems and conflicts that arise after a family member dies.

The tradition of gathering heirs together has been lost over time. The oldest of us undoubtedly recall the expression "opening the will," which aptly described the solemn gathering at which the notary revealed the contents of the will, along with the deceased's "fortune" and final wishes as to how the assets were to be shared. Today it is the liquidator of the succession, designated by the deceased, who is responsible for settling the succession. With time, this mandate has become increasingly complex, and it is not uncommon for this thankless task to spark tensions and quarrels in the family, some of which can have permanent consequences.

To avoid these pitfalls, notaries strongly advise clients to make provisions for reading of their will in front of the heirs. The reading of the will is an opportunity for the notary to inform those present about the contents of the deceased's will and property. As an independent third party, the notary can even answer questions that some individuals may be hesitant to ask for fear of offending a family member. The notary can also act as a mediator if conflicts arise as the result of the contents of the will. In addition, he or she can use this occasion to explain to the succession's liquidator, in front of all the people involved, the role and responsibilities that fall to him or her. In this way, all the heirs are made aware of what needs to be done, thus silencing any criticism of the liquidator's job.

THE READING OF THE WILL IS ONE WAY TO ENSURE THAT THE SETTLEMENT OF THE SUCCESSION STARTS OFF ON THE RIGHT FOOT. IT ALSO SERVES TO REASSURE THE LIQUIDATOR AND THE HEIRS ABOUT THE STEPS TO BE FOLLOWED IN ORDER TO RESPECT THE DECEASED'S FINAL WISHES.

The reading of the will is one way to ensure that the settlement of the succession starts off on the right foot. It also serves to reassure the liquidator and the heirs about the steps to be followed in order to respect the deceased's final wishes. Of course, drawing up the will itself is paramount to achieving this goal. It is vital that the will be complete and not open to ambiguity. ■

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Succession and Taxes

MY TAXES, YOU WILL PAY

It has been said that death and taxes are the only two things that a person cannot escape. In fact even after death, the government claims its due and the liquidator must see to it that the deceased's taxes are paid.

In concrete terms, this means that the tax authorities consider all the assets and property left by the deceased as having been sold at fair market value at the time of death. As Julie Lebreux, a notary and tax expert explains, "The deceased is considered to have sold all his assets. This means that if the deceased owned a residential building worth $1 million, the succession must pay taxes on the profits of the so-called sale. The same holds true for RRSPs. The deceased is considered to have withdrawn the RRSPs on the day of death and must pay the required income tax. Any capital gains (shares, summer cottage, bonds, and so on) are taxable, and the liquidator must produce a final declaration of revenue for the deceased. In some cases, the liquidator has options to defer this tax."

The deceased's income tax return includes all salaries, bonuses, interest, dividends earned, capital gains, and RRSPs and RRSFs said to be sold at fair market value or cashed in on the day of death. If the deceased died between January 1 and October 31, the liquidator has until April 30 of the following year to produce a tax return and pay the deceased's taxes. If, on the other hand, the deceased died in November or December, the liquidator has six months from the date of death to pay the taxes.

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TAXES DEBTS SUCCESSION

The liquidator may also produce a separate tax return for revenues that are outstanding at the time of death. These might include, for example, dividends declared but not yet paid or vacation pay.

ADVICE AND TIME

In fiscal matters, as in other matters, the liquidator plays a very important role in the direction that the succession will take. Julie Lebreux is clear that "a conscientious liquidator entrusts the settlement of a succession to a notary who, with the help of tax and planning experts, will see to it that the succession is settled in an optimal way for the deceased as well as for the heirs and beneficiaries."

It is important to know that debts and taxes need to be paid on the succession's assets before they can be distributed to the heirs. A properly settled succession implies that the liquidator has taken the time to ensure that the deceased has paid previous taxes. "All the income tax certificates must be obtained before even a penny of the succession is paid out," explains Lebreux. "If the inheritance is distributed among the heirs and there is a negative balance to be paid on a previous tax return, the liquidator will be held personally responsible for any taxes owing."

IT IS IMPORTANT TO KNOW THAT DEBTS AND TAXES NEED TO BE PAID ON THE SUCCESSION'S ASSETS BEFORE THEY CAN BE DISTRIBUTED TO THE HEIRS.

Time can also be a precious ally when it comes to succession taxes. A succession that is not settled quickly usually results in tax savings. People wrongly assume that a quick settlement is preferable. "Nothing could be further from the truth," says Julie Lebreux. "In fact, the longer the settlement takes, say two to three years, the more profitable it will be. This is because all the revenue from the succession will be taxed at progressive rates in a separate tax return from that of the succession."

With a few exceptions, tax authorities will allow a succession to remain unsettled for about three years. The only way to obtain an extension beyond this time frame is if the deceased, in his or her will, arranged for testamentary trusts. "In this case, the deceased bequeaths certain property to a testamentary trust instead of to his or her children or spouse. The revenue generated in interest, dividends or rental income is then included in a separate tax return, as if it were a new taxpayer, and taxed at progressive rates. This is what is called revenue splitting," adds Lebreux. ■

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