IN FACT AND IN LAW

Family, Personal and Estate law

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Planning your estate: an ounce of prevention is worth a pound of cure

by Marie-Claude Armstrong

Consider Planning Your Estate - General Notions "Before and After" Death

Obviously, the notion of planning one's estate is not the most appealing prospect for most of us, since it involves an in-depth reflection on the fate of our property at the time of death. However, there are several advantages to effective estate planning, and it should be guided by principles similar to those driving one's personal financial and tax planning.

Also, when death occurs, whether or not the estate has undergone detailed planning, the heirs and liquidator will be responsible for ensuring that the deceased person's last wishes are respected, as well as for administering and liquidating the estate effectively and skillfully. The heirs have rights and recourses which they may exercise, while the liquidator must carry out his functions in a diligent and appropriate manner, particularly so as not to be negligent which could give rise to civil liability.

Some estates will be opened, administered and closed uneventfully. Others may involve a much more complex process and may, for example, give rise to litigation whether due to the type of assets in the estate, the interpretation of the will or the divergent interests of the beneficiaries.

This bulletin, intended to promote awareness of estate issues, is listing different factors to be considered, whether one is wearing the hat of the testator, liquidator or heir.

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The Role of a Will

1) If there is no will:

The estate of a person who dies without making a will or whose will is cancelled due to its invalidity will devolve in the proportions and according to the terms stipulated in the *Civil Code of Quebec*. This is called an *abintestate* succession or intestacy. In such a case, it should be recalled, generally speaking, that a third (1/3) of the net value of the estate goes to the surviving spouse and two-thirds (2/3) to the children. Where there is no surviving spouse or children, the law provides that the ascendants or collaterals, whether preferred or not, are the legal heirs.

2) Drafting the will in light of the property being bequeathed and the designated beneficiaries - maximize the bequests and avoid injustices:

It is important to draft your will in a manner which ensures that your property will devolve to the persons you wish to benefit, in the proportions and on the terms you yourself have chosen.

Effective estate planning starts with the preparation of an exhaustive and up-to-date account of your assets and liabilities. This planning must provide for all the tax consequences in matters relating to the devolution of estates in order to take advantage of the legal provisions allowing for the reduction of taxes payable on estate property. Since estate planning is based on the testator's financial and personal profile, one is therefore advised to review and adapt it as needed at least every five (5) years to reflect the changes in one's personal situation and patrimony.

We should point out that in the absence of a will specifically benefiting a surviving common law spouse, he or she is not entitled to a part of the estate of the deceased spouse, since only the legally married surviving spouse of the deceased is recognized as an *abintestate* heir within the meaning of the law. Also, common law spouses preparing their wills must consider the contents of any "common law" or "cohabitation" agreement which may have been previously signed.

The principle of testamentary freedom is recognized in Quebec, although certain legislative limitations have been placed on it over the years through provisions concerning the survival of the obligation of support, the introduction of the family patrimony, the compensatory allowance remedy, the application of the matrimonial regime and, where applicable, a marriage agreement.

The nature of the property bequeathed and the persons receiving it must be considered in preparing a will in order to maximize the benefits one wishes to confer by will. In particular, certain provisions must be inserted where the beneficiary is a ***minor or incapable*** or a surviving common law spouse, and where the estate contains ***property situated outside Quebec*** and the beneficiaries live in this other jurisdiction.

It may be judicious to prepare a ***will which complies with the formalities of another country*** drafted in the language of use of that country. This additional will is attached to the "Quebec" will and would be legally effective with regard to the property abroad. This is strongly recommended for persons travelling several months per year outside Quebec.

A ***trust will*** can often be a wise solution, particularly when the aim is to reduce to a minimum the tax impact connected with the transmission of certain property, or where one wishes to confer benefits on different persons in succession for defined periods of time. A trust will can also be used to control the estate assets after death and set up a system of income splitting.

Particular attention must also be given to the transmission of a family business.

In addition, in cases of ***blended families***, a will becomes essential, otherwise there is a strong possibility that an *abintestate* transmission of the estate will produce effects that, in the testator's eyes, are unfair to persons dear to the testator whom the law ignores due to the effect of successive marriages.

For example, in the absence of appropriate gifts in a will to address their specific needs, children of the age of majority born of a first marriage who have achieved financial autonomy will be treated on an equal basis with the minor children from a second marriage whose needs may be greater.

Apart from *abintestate* transmission, there are ***more than fifteen (15) other ways to transmit property on death.*** These include wills, family patrimony, compensatory allowance, matrimonial regime, marriage contracts, life insurance, RRSPs, annuities, co-ownership, shareholders' agreements, usufruct, hereditary reserve* outside Quebec and survival of the support obligation.

* Translation of the French term "réserve héréditaire". There is no English equivalent. The expression refers to the portion of the estate reserved for the heirs by law which cannot be disposed of by the testator.

Three (3) Forms of Will Permitted by Law

The following forms of will are recognized in Quebec:

- Holograph will (handwritten and signed by the testator);
- Will in the presence of two (2) witnesses;
- Notarized will.

To be legally effective, the first two (2) types of will must be probated by a judgment of the Superior Court at the time of death.

The notary or lawyer preparing a will is required to register it in the Register of Wills with the Chamber of Notaries or Bar of Québec so that it can be easily traced after death.

Where a testator's state of health raises doubts about his or her capacity to make a will at the time of signature or execution of the will, he or she should obtain a medical certificate concurrently with the preparation of the will attesting to his or her mental and physical capacity in order to avoid any future contestation in this regard.

The Family Patrimony and Death

The provisions relating to the division of the family patrimony[1] prevail over the contents of the will. The testator cannot bequeath more than his share of the divisible value of the family patrimony.

The surviving spouse is entitled to claim his or her share in the family patrimony from the estate of the deceased spouse.

However, the heirs cannot claim the value of the deceased person's share in this patrimony from the surviving spouse since this claim is a personal right which is not transmissible to the heirs upon death.

Thus, according to a decision of the Superior Court of Quebec rendered on May 21, 1998, the heirs are entitled merely to defend themselves if the surviving spouse claims a division of the family patrimony *(Fine (Estate of)* v. *Bordo* J.E. 98-1343; out-of-court settlement filed August 18, 1998).

On the other hand, in another case rendered in 1996 (*Hopkinson* v. *Royal Trust Co.*, [1996] R.J.Q. 728), the Superior Court stated that the right to the division of the family patrimony is a right to a personal claim which is transmissible to the heirs, and they therefore have seisin in this right upon the death of the deceased. Although this decision was appealed, it was discontinued on April 22, 1998.

1 See our bulletin on the family patrimony, prepared in May 1996 and available on request.

Given the two contradictory lines of case law emerging from the above-noted cases in the Superior Court, we will have to wait until this issue comes before the Court of Appeal in a future case to settle the state of the law in Quebec on the transmissibility of the right of division of the family patrimony.

Wills that Benefit the Other Spouse

Since the new *Civil Code of Quebec* became law on January 1, 1995, the pronouncement of a divorce judgment automatically cancels the provisions in a will benefiting the surviving spouse in his or her capacity as ex-spouse. In order for such prior conditions to survive the divorce and be legally effective, it is necessary to prepare another testamentary instrument after the divorce clearly evidencing this intention.

The Liquidator

A liquidator may have been specifically appointed in a will or may be appointed by the heirs or the court, in the event of a failure of the heirs to agree on the appointment.

The person named as liquidator can refuse to accept the office and must, in such a case, be replaced. It may therefore be useful to provide for a ***"substitute" liquidator*** in the will in the event of the refusal or inability of the first liquidator to assume this function.

If justified by the value of the estate assets, or if the composition of these assets meets certain conditions, it may be very useful to appoint a ***professional co-liquidator.***

The principal functions of the liquidator are to probate the will (where necessary), draw up an inventory of the estate property and debts, provisionally administer the estate, distribute the property and render an accounting. Liquidators are discharged from their administration when the heirs accept the final accounting.

Until the liquidation of the estate is completed, liquidators must ensure the deceased's patrimony is protected and can ***incur their own liability,*** particularly if they commit an error or breach in the performance of their mandate to provisionally administer the estate.

Liquidators must be skilled and informed people. They must also be available to fulfill the functions inherent to their office. In some cases, liquidators will be well-advised to obtain the assistance of a ***team of professionals*** in order to perform the liquidation efficiently and at the least expense.

Successors and Heirs

Persons entitled to receive a share of the estate are called successors. They are designated in the will. In the case of an *intestacy*, the law grants them the right of succession according to their degree of kinship with the deceased.

Successors have the option of accepting or renouncing their successoral rights, and benefit from ***a period to deliberate and exercise their option***. This period is six (6) months from the opening of the estate (i.e. from the date of death). It is extended as of right by sixty (60) days from the date of closure of the inventory, and may be extended further by the court.

Where a successor renounces the estate, he or she may still subsequently accept it, but must do so within a maximum time period of ten (10) years from the date of opening of the estate, provided that another person has not accepted it in the meantime.

Successors who have accepted the estate are ***called heirs***. Heirs have rights and in some cases also ***obligations*** they must comply with. In particular, the sole heir of an estate must bear the payment of the debts and particular legacies alone to the extent of the value of the property he or she receives. If there are several heirs, each is bound to pay the debts and particular legacies in proportion to their share, subject to the rules on indivisible debts.

Legal Representation

Legal representation occurs when a relative becomes entitled to receive an estate which was left to his or her ascendant where the ascendant predeceases the deceased or dies simultaneously with the deceased, or where the ascendant is unworthy. Representation takes place infinitely in the direct line of descendants, but never comes into play in favour of ascendants. Representation in favour of preferred collaterals (brothers, sisters, nieces and nephews) exists, but to a limited extent. Ordinary collaterals can only become entitled to receive the estate if they are themselves descendants of preferred collaterals.

Representation also occurs in the case of a testamentary succession, but only where specific conditions are met.

Contesting a Will

Any interested person who has reason to believe that a will is not valid may request that the instrument be declared null by way of an action contesting the will. This action must invoke the ***testator's incapacity*** or ***undue influence*** used against the testator at the time of signature or execution of the will by a person who thereby benefits from the act. The action in nullity is prescribed by a time period of three (3) years from the date that the person invoking the nullity has knowledge of the cause thereof.

Reconstituting a Will

A will that has been lost or destroyed by a fortuitous event after the testator's death, or which is held by a third party, may be reconstituted through a legal action by testimonial evidence or evidence by presumption.

Bill 443
An Act to amend the Code of Civil Procedure and other legislative provisions in relation to notarial matters

Bill 443 was adopted on October 20, 1998 by the Quebec National Assembly. This bill amends the *Code of Civil Procedure* to allow certain applications relating to tutorship for a minor, protective supervision of a person of full age, mandates in anticipation of incapacity and probate of wills to be presented to a notary.[2]

Thus, when this bill becomes law by order in council of the government,[3] this will change the judicial process currently applicable.

This bill provides that when the application is presented to a notary, he or she is bound to file an authentic copy of the minutes of the notarial operations at the office of the court without delay, together with all the supporting documents.

In the absence of opposition within ten (10) days of the deposit, the judge or clerk may approve the notary's minutes if they meet the conditions prescribed by law.

2 The bill requires notaries to obtain certification from the Chambre des notaires after following specific training given by it.

3 At the time this bulletin went to press, the only applicable provision of the bill was that conferring the power on the Chamber of Notaries to adopt a regulation on the compulsory training of notaries for purposes of their certification (date of coming into force: October 21, 1998).

Even in the absence of opposition, the judge or clerk may reject the conclusions of the notary's minutes, or make any orders necessary to safeguard the rights of the parties for the time period and on the conditions that he or she may determine.

The new provisions specify that the deposit of the minutes of probate of a holograph will or a will made in the presence of witnesses is intended solely for publication purposes, without the necessity of probating the will.

Finally, the bill provides that the designation or replacement of the liquidator of the estate must be published in the register of personal and movable real rights and in the land register, where applicable.

Whether in connection with a role you may assume at the time of a death or in connection with your own personal estate planning, it is prudent to obtain the appropriate advice and services for each situation. Our team is able to assist you with skill and professionalism on any matter connected with estate law.

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