A Few Lessons Learned from Estate Practitioners

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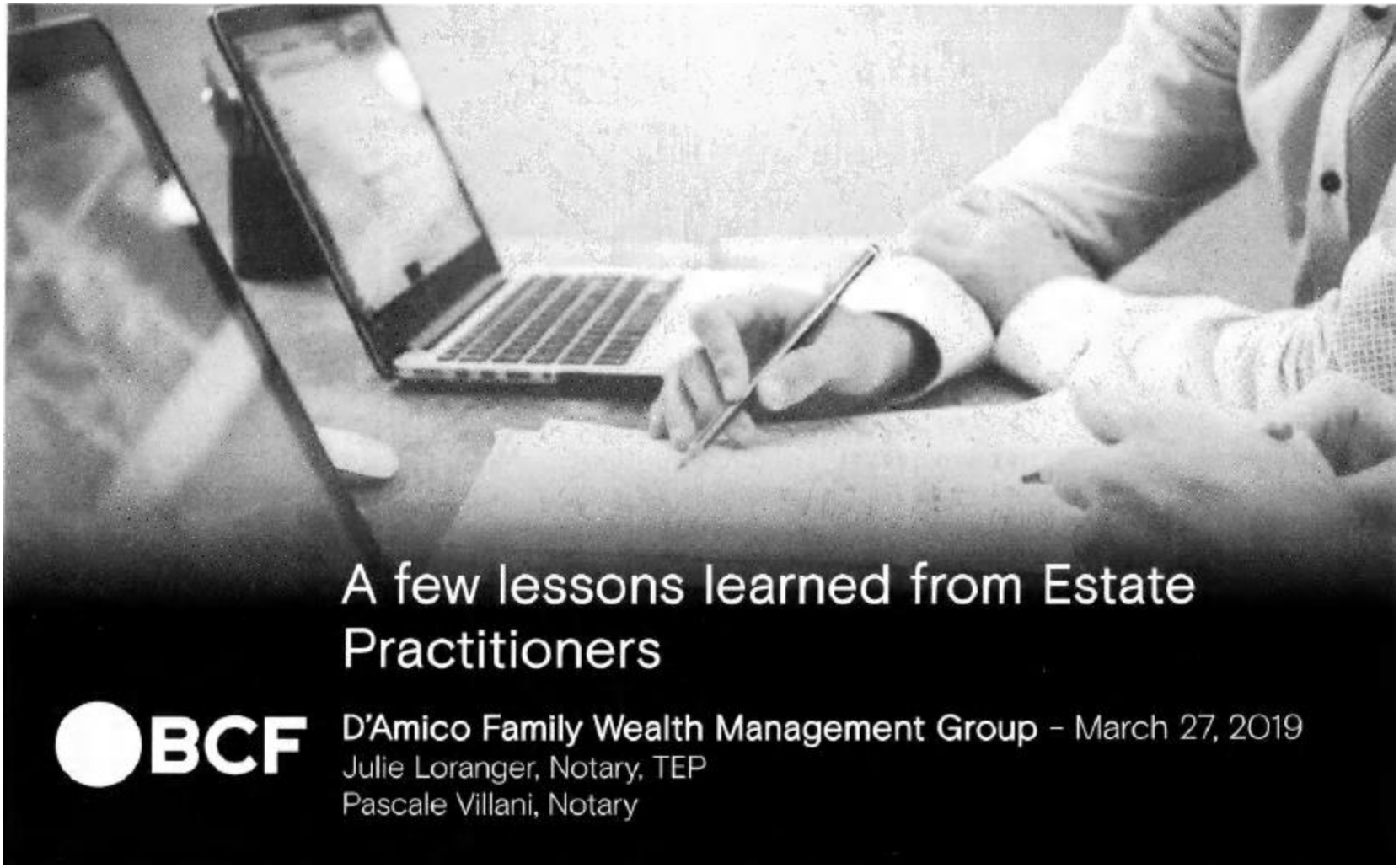
A few lessons learned from Estate Practitioners
BCF
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Introduction

- Estate settlements are the "ultimate test" for the Wills we prepare for our clients
- Wills cannot account for every unforeseen situation
- Using a few cases experienced by them, we will describe our tips and "best practices" for estate practitioners, starting from asking the right questions, drafting more adapted and detailed Wills, documenting their files and establishing measures to avoid litigation
- We will also comment a few Court decisions that every estate practitioner should be aware of when taking part in an estate settlement


Best practices to properly initiate the settlement of an estate
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The reading of the Will...

Not like in the movies...

- Is not a concept provided for in the Civil Code of Quebec
- In which situation should we do a reading of the Will?
  - When a specific provision in the Will describes the terms, who must be present
  - Usually no penalty if a reading is not made (but the liquidator must carry out the testator's wishes)
- If there is no provision, the liquidators may consider it appropriate to do so
- Who will read the Will?
  - A lawyer or a notary appointed by the liquidators (not necessarily the person who drafted the Will)

The reading of the Will...

The benefits

- Explain to the legatees what they will be entitled to regarding the Will
- Ensure that the liquidators and legatees understand the provisions of the Will, steps of an estate settlement delays, the liquidators' duties and the legatees' rights
- Begin the estate settlement on good terms
- Manage the legatees' expectations by explaining the delays
- Allow legatees to ask questions
- Prevent litigation (communication and transparency)

The reading of the Will...

Preparation of the liquidators

- There are no pre-requisite courses to be a liquidator, anyone can be appointed
- How to ensure the liquidators are well prepared:
  - Make sure they understand the testamentary provisions
  - Explain the estate settlement process
  - Inform them of their duties and obligations
- Usefulness of the meeting for the lawyer or notary:
  - Identify the urgent actions to be taken (ex: damage insurance, high-risk investments)
  - Obtain information on the family dynamic
  - Assess the type of assets and liabilities of the deceased and the risks
  - Confirm which document to send to the legatees before the first meeting

The reading of the Will...

Preparation of the liquidators

- Answer the liquidators' questions.
  - Determine if some research must be made before the meeting in order to inform the legatees (ex: if a liquidator of a legatee resides abroad)
- Discuss who will attend the reading (are the spouses invited? Children? Advisors of the Deceased?)
- Agree on a strategy to manage difficult personalities
- Agree on a communication method if several liquidators
- Confirm the terms and conditions applicable to the reimbursement of expenses and the method for calculating the remuneration of the liquidators
- Identify what will be done by the professionals or by the liquidators themselves

The reading of the Will...

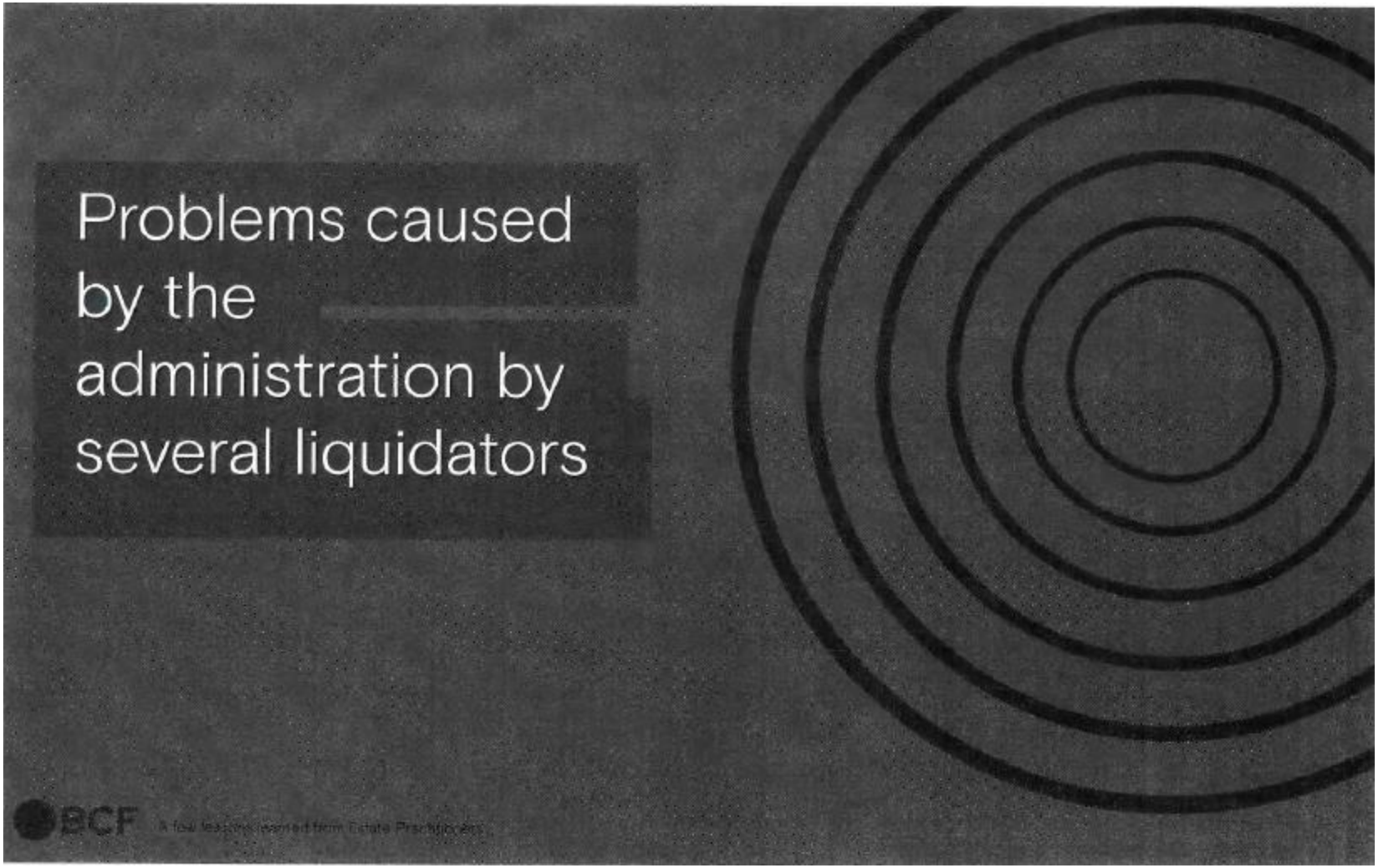
The meeting

- Where : neutral location is recommended
- How : Meeting in person or via conference call?
- Who : Can the legatees' legal counsel attend?
- Should we prepare minutes of the meeting?

Sharing the content of the Will

A rehearsal during the testator's life

- Should a testator share the content of his Will with his heirs during his lifetime?
  - Allows parents to explain their choices (creation of a trust, conditional bequest, appointment liquidators, etc.)
  - Allows family members to express their point of view and manage their expectations upon the testator's death
  - Allows the legatees to adjust and demonstrate their ability and maturity to manage their assets alone without the intervention of a third party
  - Disadvantage: can lead to claims for advances on inheritance and harassment to have more
  - If you don't want to justify any subsequent change, you should keep a record of your motives


Problems caused
by the
administration by
several liquidators
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Some of the challenges encountered when several liquidators serve

- Designation of 3 liquidators: Wills usually provide that they act by majority
- Special clause: Will mentions that either one of the liquidators can act alone
- Result : any liquidator can bind the estate without consulting the others (ex: 2 liquidators could sign 2 different brokerage contracts for the same building)
- Such provision may be provided only if there is an unparalleled communication and complete trust between liquidators
- Issues:
  - Liquidators' liability
  - Consistency of the administration (one liquidator could go against what the other had planned)
  - Costs

Some of the challenges encountered when several liquidators serve

- If decisions are to be taken by the majority, all liquidators must be consulted (see the Sofaer case below)
- **General Principle: Article 1337 C.C.Q.:**

  "An administrator may delegate his duties or be represented by a third person for specific acts; however, he may not delegate generally the conduct of the administration or the exercise of a discretionary power, except to his co administrators. [...]"
- However, when opening an estate account, the financial institutions require that all liquidators be present
- Sale of a building: it is required to prove each of the liquidators' capacity

Some of the challenges encountered when several liquidators serve

- Even in the presence of a delegation of authority, all liquidators remain responsible for the other liquidator's actions, unless they dissent
- **General Principle: Article 1335 C.C.Q.**

  "An administrator is presumed to have approved any decision made by his co-administrators. He is liable with them for the decision unless he immediately indicates his dissent to them and notifies it to the beneficiary within a reasonable time. (...)"
  (our emphasis)
- Appointment of more than three liquidators: should be in exceptional circumstances because it could paralyze the settlement of the estate (ex: 5 liquidators)

Legal and human difficulties related to the liquidator's resignation

- **General Principle: Article 791 C.C.Q.**

  "Any interested person may apply to the court for the replacement of a liquidator who is unable to assume the responsibilities of his office, who neglects his duties or who does not fulfil his obligations. (...)"
- Liquidators with gradual loss of capacity
- The gray area: Not fit... but not unfit
- Not fit enough to resign
- Opening of a protection regime? (deadlines)
- If urgent, Court order
- The liquidator's mandatary may not act as his substitute unless there is a specific provision to that effect in the Will
- Preventive measures: provide an automatic termination in the Will (ex: as of 90 years old)


Some challenges
when interpreting
bequests
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Bequest of a property sold during the testator's lifetime

The bequest may not be null

- Will signed in 1999: bequest of the principal residence by particular title
- In 2008, the testator's protection mandate is probated by the Court due to his total and permanent incapacity
- In 2009, the testator is housed in a care facility better suited to his needs
- In 2010, his mandatary sells his residence (no sale restrictions in the protection mandate)
- In 2011, the testator dies
- The residence is no longer part of the deceased's estate
- Is the bequest really null?

Bequest of a property sold during the testator's lifetime

- **General Principle: Article 769 C.C.Q.**

  "Alienation of bequeathed property, even when forced or made under a resolutive condition or by exchange, also entails revocation with regard to everything that has been alienated, unless the testator provided otherwise.

  Revocation subsists even if the alienated property has returned into the patrimony of the testator, unless a contrary intention is proved. [...]"

Bequest of a property sold during the testator's lifetime

Morin v. *Morin*, 2007 QCCQ 11930

- Ms. Talva suffers from Alzheimer
- Leaves her house in Laval to live with her son Louis
- Louis, as Ms. Talva's mandatary, sells her house to protect the residual value
- Ms. Talva dies
- The Will, signed in 1992, provides a :
  - Bequest of the house to Louis
  - Residual bequest to Louis and Jacqueline equally
- Jacqueline claims that the sale of the house in 1997 entails the revocation of the bequest

Bequest of a property sold during the testator's lifetime

Morin v. *Morin*, 2007 QCCQ 11930

« Lorsqu'on parle d'aliénation du bien légué, on pense évidemment à la vente du bien par un testateur de son vivant. Le fait qu'un testateur aliène de son vivant un bien légué par testament crée une présomption que celui-ci ne désirait plus léguer ce bien et que cette vente emporte une révocation implicite du legs »

« La vente n'a cependant pas le même effet lorsque l'aliénation est faite par quelqu'un d'autre que le testateur (un curateur, un mandataire), sans la participation consciente de ce dernier »

(Our emphasis)

Bequest of a property sold during the testator's lifetime

Morin v. *Morin*, 2007 QCCQ 11930

- The judge concludes that:
  - Ms. Talva' wishes to bequeath her house to her son was still the same at the time of her death – the sale did not depend on her
  - Louis had the right to receive the sum of $33,000 (corresponding to the proceeds of sale of the house)
- Lesson learned:
  - The presumption of revocation does not apply if the sale is made by the mandatary during a person's incapacity

Bequest of a property sold during the testator's lifetime

***Quirion* v. *Héritiers de feu Armand Éthier*, J.E. 84-973 (C.S.)**

> *« le curateur à l'interdit ne peut révoquer les legs faits par l'interdit »*

- The alienation by the curator does not imply the revocation of the bequest
- However, the bequest is null if the property is not the property of the testator at the time of his death

> *« Le seul recours qu'il resterait au légataire est l'action en dommages-intérêts contre le curateur, s'il parvenait à démontrer que ce dernier n'a fait l'aliénation que pour rendre le legs caduc »*
>
> (Our emphasis)

Bequest of a property sold during the testator's lifetime

***Michailuk* v. *Michailuk*, J.E. 2003-1818**

- Building sold by the testator's curator in 2001.
- Research on the testator's intention: her desire to bequeath the building implicitly included her desire to bequeath the proceeds of sale
- Judge orders the estate to pay the legatee his share of the proceeds of the sale of the property

***Edisbury* v. *Desjardins* (1998), R.J.Q. 2437 (C.S.)**

- Judge searches for the testator's intent
- Demonstrating the testator's intent not to revoke the bequest provided for in the Will is sufficient to set aside the presumption of revocation of the bequest

Bequest of a property sold during the testator's lifetime

Grenier v. *Grenier* 2015 QCCA 4462

- Ms. Gervais is hospitalized
- Her son acts as mandatary to the property
- Her house is sold to her daughter Lise ($40,000)
- In her Will : bequest of her house to Lise
- Other legatees claim that Lise renounced to her bequest by buying the house
- Lise requests for the proceeds of the sale to be remitted to her
- Judge orders the sum of $40,000 to be paid to Lise

Bequest of a property sold during the testator's lifetime

Liquidator: risk analysis

- The presumption of revocation does not necessarily apply in the case of a sale by the mandatary during a period of incapacity
- Revocation of a bequest cannot be presumed
- In the absence of restrictions in the mandate, the disposal of the property during the incapacity is valid
- The legatee by particular title is not entitled to the property bequeathed (in kind)
- The bequest is not necessarily revoked
- Potential claim by the legatee by particular title against the estate for the property's value
- Recommendation: prepare an agreement (transaction) if everyone agrees

RRSP: designation and/or bequest

- General principle as set out in: *Banque de Nouvelle-Écosse* v. *Thibault*, [2004] 1 R.C.S. 758) :

« Les désignations de bénéficiaires effectuées dans le cadre de régimes enregistrés d'épargne-retraite et de fonds enregistrés de revenu de retraite au Québec ne sont validement faites que si l'investissement sous-jacent est une rente ou un produit émis par une compagnie d'assurance. »

RRSP: designation and/or bequest

- **Common provisions in Wills :**
  - Designation of a beneficiary for the RRSP
  - If the designation is found to be invalid or is not possible, bequest by particular title of the RRSP made immediately after

RRSP: interpretation issues seen in a Will

- **SECTION IV**

  I designate Mrs. A., as beneficiary of all the rights, title and interest which I may have at the time of my death in any registered retirement savings plan (...)

- **SECTION V**

  I bequeath, as particular legacies :

  1- Should the total monetary value of the properties mentioned in SECTION IV not be equal to the sum of $800,000.00 I bequeath, as particular legacy, to Mrs. A., a sum of money equivalent to the subtraction of $800,000.00 less the said total monetary value of the properties mentioned in SECTION IV on the day of my death

RRSP: designation and/or bequest

Issues:

- This RRSP was purchased from a bank – it is not an annuity of an insurance product
- Beneficiary designation provided for in the Will is invalid
- Compensation bequest if the amount received is lesser than to $800,000
- The RRSP in question has a value of $2M
- Will the liquidator have to pay the RRSP in full ($2M) or remit $800,000?

RRSP: designation and/or bequest

Possible solutions

- If all legatees agree and wish to respect the designation
  - Transaction under article 2631 C.C.Q.
- In the presence of a minors or an incapacitated person: obtain the authorization of his legal representative, legal advisor, and sometimes even the Court (it could also require an ***ad hoc tutor****
- Otherwise, obtain declaratory judgement
  - The judge will have to search for the testator's intention (external evidence)

The ad hoc tutor is given a **temporary mandate: their action is limited to representing the child in a specific situation*

Conditional bequest

- **General Principle:** debts and obligations are borne by the residual legatee unless indicated otherwise

Article 739 C.C.Q.

"A legatee by particular title who accepts the legacy is not an heir, but is nonetheless seized of the property bequeathed, as is an heir, by the death of the deceased or by the event which gives effect to the legacy.

He is not liable for the debts of the deceased on the property of the legacy unless the other property of the succession is insufficient to pay the debts, in which case he is liable only up to the value of the property he takes."

(our emphasis)

Conditional bequest

- I bequeath to my daughter, Camille, as a particular legacy, all the shares that I will own in YXZ Inc. in full ownership
- I bequeath the residue of the property of my estate to my spouse, in full ownership
- Problems:
  - Death triggers a deemed disposition of the property at fair market value (unless bequeathed to spouse)
  - Shares were acquired in 1965 for $10. They have a market value of $500,000
  - The bequest by particular title does not mention that Camille will have to pay the taxes resulting from the deemed disposition at the time of death
  - Camille will receive the shares
  - The residual legatee (spouse) will have to pay the taxes

Conditional bequest

Picard v. *Succession de Lagotte*, 2017 QCCS 330

- Case was appealed and confirmed in appeal Picard v. Succession de Lagotte, 2017 QCCA 254
- Deceased Micheline Lagotte bequeathed by particular title to her husband Mr. Picard
  1) the main residence
  2) a 30-unit building
- Residue of the assets bequeathed to other family members (including one of the liquidators)
- There is a significant latent tax gain on the apartment building
- According to tax laws, upon death there is a deemed disposition of property at fair market value, but there is an automatic rollover to the spouse
- When Mr. Picard will sell the building, there will be significant capital gain

Conditional bequest

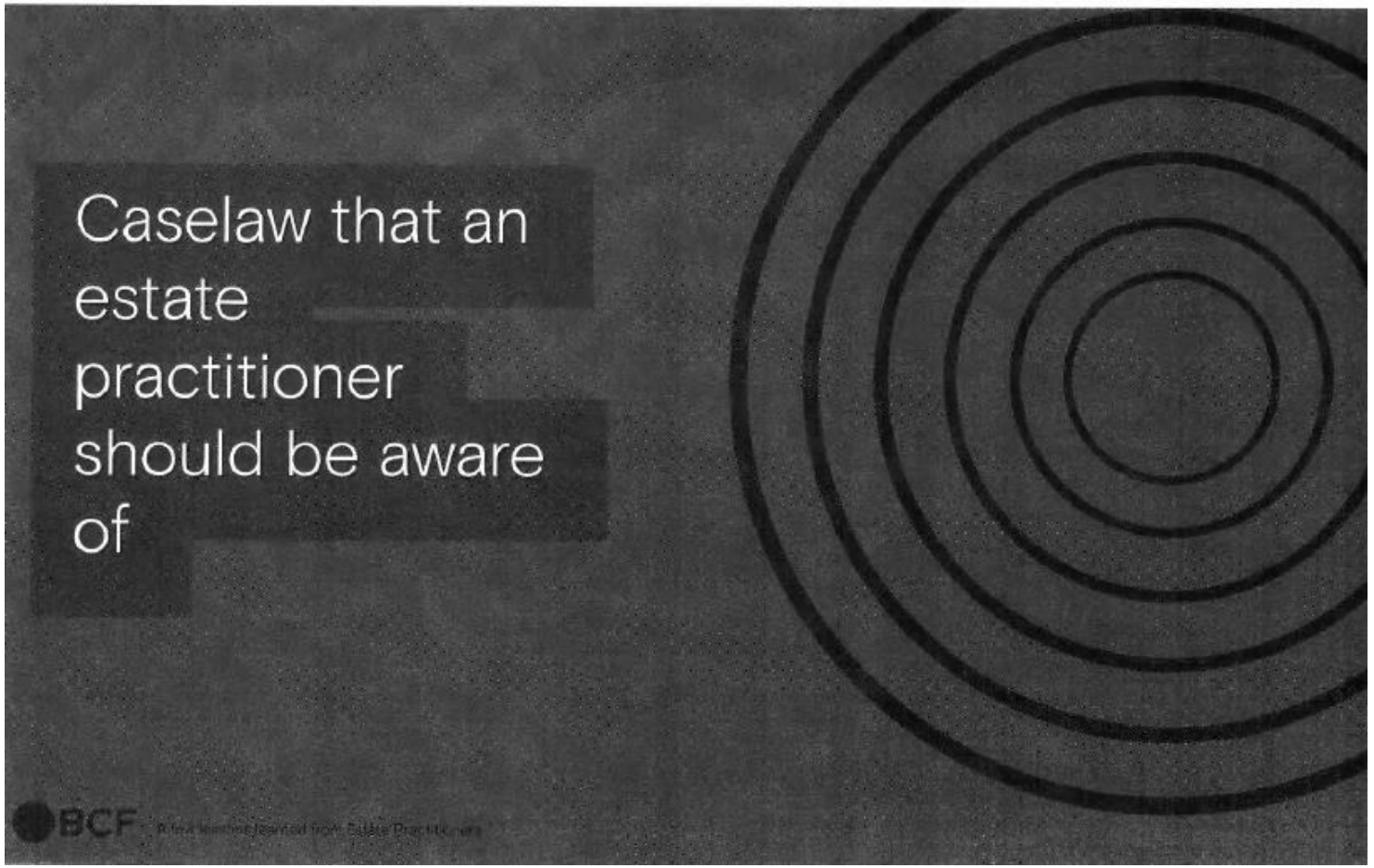
Picard v. *Succession de Lagotte*, 2017 QCCS 330

If the rollover applies	Tax Election not to apply the rollover
• Acquisition cost: approx. $300,000	• Acquisition cost: approx. $300,000
• FMV at Ms. Lagotte's death: $1,300,000	• FMV at Ms. Lagotte's death: $1,300,000
• Rollover to spouse	• Deemed disposition at the time of her death
• Residence cost: $300,000	• $1M in gains
• Mr. Picard sells for $1,3M: gain $1M	• Approx. Taxes: $250,000
• Approx. Taxes: $250,000	• Paid by the estate
• Paid by Mr. Picard	• Mr. Picard's cost $1,3M
	• If he sells at $1,3M: no additional Taxes

Conditional bequest

Picard v. *Succession de Lagotte*, 2017 QCCS 330 (confirmed 2017 QCCA 254)

- Lessons learned
  - Notwithstanding article 737 C.C.Q., the question of the tax burden or debts relating to bequests by particular title are often brought before the Courts
  - Anticipate and indicate who will bear the debts, taxes including latent taxes and those triggered by the deemed disposition related to the property bequeathed by particular title in the Will
  - Clarify the testator's intention regarding the spousal rollover (ex: RRSP bequest conditional to the payment of the taxes if the spouse does not apply the rollover, or if the legatee is not the spouse)


Caselaw that an estate practitioner should be aware of
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Real situation

Distribution prior to obtaining Final clearance certificates

- Two liquidators have almost completed the settlement of the estate
- The liquidators have already made partial distributions but want to wait for the Final Clearance certificate (ARC) and the Final certificate authorizing the distribution of property (MRQ) before making the final distribution (collectively the "**clearance certificates**")
- The liquidators have been informed that under tax law, they would be personally liable for the amounts remitted prior to obtaining the Clearance certificates
- They received a demand letter from the deceased son's counsel stating that the final distribution cannot be delayed pursuant to *Coorsh* v. *Téroux*

Distribution prior to obtaining Final clearance certificates

Coorsh v. *Téroux*, 2010 QCCS 460

- Decision invoked by legatees who wish to force the liquidators to distribute the particular and residual bequests prior to obtaining the final clearance certificates from the tax authorities
- Judgment rendered by judge Jean-Pierre Sénécal in an estate where the liquidator (notary) was negligent
- Argument invoked:

Article 807 C.C.Q.

"Where the succession is manifestly solvent, the liquidator, after ascertaining that all the creditors and legatees by particular title can be paid, may pay advances [...] to the heirs and legatees by particular title of sums of money. The advances are imputed to the shares of those who receive them."

Distribution prior to obtaining Final clearance certificates

Coorsh v. *Téroux*, 2010 QCCS 460

« *[72] Même les textes fiscaux constituent ici une piètre défense pour Me Téroux. Ils interdisent au liquidateur de disposer des biens et de les attribuer sans avoir obtenu des autorités fiscales les certificats de libération prévus à l'article 159 de la Loi de l'impôt sur le revenu, au fédéral, et à l'article 14 de la Loi sur le ministère du Revenu, au provincial. La seule sanction d'une contravention à cette disposition est cependant que le liquidateur engage sa responsabilité personnelle quant aux montants d'impôt dont la succession pourrait être redevable, jusqu'à concurrence de la valeur des biens répartis ou attribués (la loi provinciale permet une distribution de 12 000 $ sans aucune responsabilité).* »

Distribution prior to obtaining Final clearance certificates

Coorsh v. *Téroux*, 2010 QCCS 460

« *[73] En l'espèce, il n'y avait en pratique aucun risque pour les liquidateurs quant à leur responsabilité personnelle en regard des impôts éventuellement payables puisque la succession était de plus de un million de dollars sans pratiquement aucune dette, que les impôts éventuels à payer étaient peu élevés, que le défunt avait toujours fait ses déclarations d'impôt, que sa situation était bien connue et que le comptable Shetzer avait estimé que les impôts à payer ne dépasseraient pas plus de 50 000 $ (le montant final sera en fait de 29 200 $!).* »

(Our emphasis)

Lessons learned from the *Coorsh* case

Potential solutions

- Appoint liquidators who are legatees, willing to assume the tax responsibility
- Discuss the issue with the chosen liquidators and the testator (this could influence the testator's choice of liquidators)
- Provide a specific provision in the Will allowing the liquidators to wait for the final clearance certificates before distributing
- Apply for a partial certificate authorizing the distribution of property (MRQ) for the deceased to reduce the liability
- The liquidator should obtain an indemnification engagement if he distributes before receiving the final clearance certificates
- Retain an amount *in trust* for a certain period of time
- It is possible that the liability insurance of a professional liquidator (lawyer, notary, accountant) does not cover his duties as a liquidator

Lessons learned from the *Coorsh* case

Potential solutions

- A liquidator can resign before distributing the assets if he is not comfortable with a distribution before obtaining the final clearance certificates (but after obtaining a release from his duties!)

  Article 1359 C.C.Q.:

  "An administrator is bound to make reparation for injury caused by his resignation where it is submitted without a serious reason and at an **inopportune moment** or where it amounts to failure of duty."

- Reminder: clearance certificates obtained under false pretenses do not release the liquidators' responsibility

Tax liability and requests for advances

Gaetano v. *Gaetano*, 2018 QCCS 79

- Judge orders the liquidator to make an advance to a legatee before obtaining the clearance certificates given that the estate is manifestly solvent
- Judge mentions that the liquidator cannot request detailed proof of payment for medical expenses because it is a bequest and not a reimbursement of expenses
  - **Lesson learned #1:** liquidators' discretion is limited: they can not impose "conditions" on the legatee to distribute
  - **Lesson learned #2:** the fact that the liquidators are liable for taxes for all the amounts distributed before obtaining the clearance certificates does not carry much weight when the estate is obviously solvent

Acting by majority does not mean to ignoring the 3rd liquidator

Sofaer (Succession de) v. *Mashaal*, 2014 QCCS 3402

- The deceased named three liquidators
  1) Bank manager
  2) The son of his second wife, and
  3) Accountant
- Only the accountant took on the responsibilities
- In the Will, the deceased's daughter, Ms. Sofaer, is named as a substitute and becomes a liquidator
- Mr. Mashaal is named by Ms. Sofaer and the accountant
- Ms. Sofaer is the residuary legatee (in trust)
- Ms. Sofaer, even though she is named as liquidator and beneficiary of first rank, is completely excluded from the estate settlement

Acting by majority does not mean to ignore the 3rd liquidator

Sofaer (Succession de) v. *Mashaal*, 2014 QCCS 3402

> « *[59] [....] Il est vrai que le testament prévoit que les décisions sont prises à la majorité. Mais pour prendre une décision à la majorité, encore faut-il que les trois liquidateurs soient appelés à se prononcer sur les décisions à prendre.* »
>
> (Our emphasis)

Acting by majority does not mean to ignore the 3rd liquidator

Lessons learned from the Sofaer case

- Applicable principle when having three liquidators whose decisions must be taken by majority:
  - Every liquidator must be consulted and heard before a decision is made
  - If the relationship between the liquidators is strained, it might be best to hold a conference call or meetings convened in advance (within a reasonable period of time) and forward the lists of items to discuss beforehand
  - Minutes should be drawn up and sent to all liquidators
  - If a liquidator disagrees, he must notify the other liquidators and the legatees of his disagreement within a reasonable delay (1335 C.C.Q.)

Right of access to information at all times

Lacopo v. *Ragonese*, 2011 QCCS 4571

- Son took action against the liquidators and trustees to obtain information (he is a potential beneficiary of a trust)
- Judge relies on 1354 C.C.Q. and on 1287 C.C.Q. and orders the liquidators and trustees, within a period of 15 days, to grant the applicant access to the books and records of the late Salvatore Lacopo's estate and of the trust established in favor of Ms. Émilia Filippone, including the supporting documents including the documentation of any corporation under the control of the trust including the documentation, securities and financial statements of Gestion Gérace Ltée

Right of access to information at all times

Lacopo v. *Ragonese*, 2011 QCCS 4571

Article 1354 C.C.Q.

"An administrator shall at all times allow the beneficiary to examine the books and vouchers relating to the administration."

Article 1287 C.C.Q.

"The administration of a trust is subject to the supervision of the settlor or of his heirs, if he has died, and of the beneficiary, even a future beneficiary. In addition, in cases provided for by law, the administration of a private or social trust is subject, according to its object and purpose, to the supervision of the persons or bodies designated by law."

Lessons learned

Lacopo v. Ragonese, 2011 QCCS 4571

- If you don't want a person to have access to information about an estate, it is better not to name this person in the Will as a liquidator, legatee or beneficiary to avoid requests for information
- If you wish to favor somebody:
  - Give during your lifetime and exclude the person from your will
  - Appoint the person as the beneficiary of a life insurance policy

The power to test cannot be delegated

Cohen v. *Succession de Cohen*, 2018 QCCS 3212

> *« Je désigne, donne et lègue à des oeuvres de bienfaisance en Israël tous mes biens mobiliers et immobiliers. (...) Le choix des oeuvres de bienfaisance est à la discrétion de l'éxécuteur testamentaire »*

- The deceased's brother asks to cancel the Will or to have the bequest declared null
- Invoked argument: the power to test is personal and cannot be delegated to the liquidator

Article 706 C.C.Q.:

> "No person may, even in a marriage or civil union contract, except within the limits provided in article 1841, renounce his or her right to make a Will, to dispose of his or her property in contemplation of death or to revoke the testamentary provisions he or she has made."

The power to test cannot be delegated

Cohen v. *Succession de Cohen*, 2018 QCCS 3212

- This provision is of public order
- A testator may confer this power on to a trustee, if a trust is created in the Will and the type of charitable organization is determined (1282 C.C.Q.)
- No trust was established in this case

Michaud v. *Michaud*, 2017 QCCS 3693

- Mr. Camille Michaud is the liquidator
- Suing his sister Monique Michaud for amounts she would have taken for herself during her administration as mandatary
- Monique categorically denies – argues that all the amounts were withdrawn while the deceased was in full possession of her intellectual faculties
- Mr. Camille Michaud dies during the proceedings
- Substitute liquidators are Monique (who is being sued) and Louise Michaud
- Louise Michaud wants to continue the proceedings and have Monique removed because she believes that Monique has placed herself in a situation of conflict of interest (she must choose between the interests of the estate and own)

Michaud v. *Michaud*, 2017 QCCS 3693

- The judge reminds them that a dismissal is an exceptional measure
- The fact that a liquidator has interests opposed to those of a legatee does not, in itself, justify a dismissal
- The liquidator cannot be in a position where he may be called upon to choose between his personal interests and those of the heirs
- The judge reminds that the plaintiff's allegations have not been proven
- It is necessary that the plaintiff's claim be carried out and given that there are 2 liquidators who have an equal vote, until the judgment, Monique would be in a conflict of interests

Michaud v. *Michaud*, 2017 QCCS 3693

- Because of the litigation (and not a proven breach of duty), Monique is declared unfit to continue to act as liquidator as she would find herself as plaintiff and defendant in the same case
- Louise carries on with the lawsuit against Monique and the judge ultimately appoints Louise as sole liquidator


Other problematic situations experienced in estate settlement files
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Requests for advances from legatees

- The settlement of an estate can be a long process
- If the estate is manifestly solvent, some liquidators may be comfortable making advances to the legatees if need be
- Consider a partial distribution rather than an advance?
- Best practices:
  - Be mindful of legacies by particular title (priority)
  - Keep a sufficient amount to cover potential debts, taxes and litigation (if applicable)
  - Consider all legatees' rights (treat them equally)
  - Keep track of advances in writing
  - Describe the context that gave rise to the advance and the reasons supporting the decision to proceed
  - Pay with the estate's assets : do not proceed with advances from the liquidator's personal assets!

Bequest by way of substitution

I bequeath the residue of the universality of the assets of my estate (hereinafter called the "**Substituted property**"), to my Spouse (the "**institute**"), whom I appoint my sole residual legatee, on his charge to return the substituted assets upon his death, in equal shares to my children in the first degree (the "**substitute**").

Bequest by way of substitution

- Some advantages:
  - Gives some protection to the **substitute** at the death of the institute
  - Designation of an independent trustee will not be required
  - Reduced drafting fees (no trust)
  - Substitution of *residuo* leaves a lot of latitude to the institute
- Disadvantages:
  - Inventory is not often prepared at the beginning or is incomplete
  - Tracking of amounts received and separate accounting rarely respected
  - Substitutes may request access to documents and annual rendering of account
  - If the assets have been squandered, the substitutes recourse is theoretical (recovery of assets is difficult or impossible)

Bequest by way of substitution of *residuo*

Example

- Couple without kids
- The wealthiest spouse bequeaths his assets to his spouse in substitution of *residuo*, in charge of handing over the residue of substituted assets to his brothers and sisters
- The surviving spouse cannot give or bequeath substituted assets
- Surviving spouse does not prepare an inventory
- Confusion between personal and substituted assets
- No separate accounting
- The substitution is not published
- Surviving spouse increases the standard of living of his new spouse
- Surviving spouse dies and bequeaths all of his property to his sister

Bequest by way of substitution of *residuo*

Example

- Discovery of the substitution by the substitutes
- According to the doctrine, substitutes are seized with the substituted assets at the time of death
- The substitutes claim almost all of the deceased's assets
- Voluntary disclosure process in progress with the tax authorities, liquidator refuses to distribute assets
- According to the facts on file, certain of the surviving spouse's investments could be defined as gifts
- It results in having to hire a forensic accountant to trace back the origin of the assets and to separate the substituted assets from the assets belonging to the surviving spouse

Liquidator who is director of a corporation

- The liquidator may exercise his voting rights related to the shares during the settlement of the estate which may allow him to elect himself as director
- The liquidator's duties are different from those of the director of a corporation
- The directors' duty is towards the corporation and not toward the shareholders or creditors. Preferred or ordinary shareholders may only have the reasonable expectation that the directors will act in the corporation's best interest.

BCE Inc. v. *Debentureholders of 1976*, 2008 SCC 69, [2008] 3 SCR 560, para. 68.

Liquidator who is a director of a corporation

Liquidator is an administrator of the property of others, he must exercise his powers while taking into account his duties:

Article 1308 C.C.Q.

"The administrator of the property of others shall, in carrying out his duties, comply with the obligations imposed on him by law and by the constituting act. He shall act within the powers conferred on him. [...]"

Article 1309 C.C.Q.

"An administrator shall act with prudence and diligence. He shall also act honestly and faithfully in the best interest of the beneficiary or of the object pursued."

Article 1310 C.C.Q.

"No administrator may exercise his powers in his own interest or that of a third person or place himself in a position where his personal interest is in conflict with his obligations as administrator. [...]"

Liquidator who is a director of a corporation

- In the Giroux case, the son had attempted to have the trustees removed on the basis that they had appointed themselves as directors
- The judge found that the trustees had the power to appoint themselves as directors and went even further by stating that the file's context required that they appoint themselves as directors of the companies

  Giroux v. *Langlois*, 2012 QCCS 4197, see par. [17] to [20].
- To act as liquidator (or trustee) and director is not a fault in itself
- Cannot be a corporation's director operating a business without having the required qualifications or without hiring the qualified individuals to oversee operations
- Testator's option to impose his wishes to instruct the liquidators to withdraw the directors' powers – unanimous shareholder agreement

Liquidator who is a director of a corporation

- Pros
  - Reduction of the number of participants
  - Allows for increased monitoring of the company's administration
- Cons
  - Difficulty reconciling the duties of the administrator of the property of others and those of the director of a corporation
  - Possible conflict of interest

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